No. _____ (1)

Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

October Term, 1997

PALUMBO BROS., INC., *ET AL.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the United States Court of Appeals for the Seventh Circuit err in holding that the federal labor laws never can preempt or otherwise restrict a criminal RICO/mail fraud prosecution, even if the conduct at issue allegedly is wrongful only by virtue of obligations in collective bargaining agreements?

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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* Pursuant to Supreme Court Rule 29.6, Palumbo Bros., Inc. states that it does not have a parent company, but that it does have both a general and a limited partnership interest in Orange Crush Recycle, L.P.

** Pursuant to Supreme Court Rule 29.6, Monarch Asphalt Co. states that it does not have a parent company, nor does it have any nonwholly owned subsidiaries.

*** Although Monarch Asphalt Co., Kelson Abdishi, and Gerald McGreevy were named as parties in the proceeding before the United States Court of Appeals for the Seventh Circuit, they did not submit briefs or participate in the proceeding because the District Court's order being reviewed did not dismiss any charges pending against them.

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CITATIONS OF OPINIONS AND ORDERS

The opinion of the United States Court of Appeals for the Seventh Circuit reversing the decision of the United States District Court for the Northern District of Illinois, *United States v. Palumbo Bros., Inc.*, 145 F.3d 850 (7th Cir. 1998), and the order denying the petitioners' timely petition for rehearing, *United States v. Palumbo Bros., Inc.*, No. 97-3807, 1998 U.S. App. LEXIS 12714 (7th Cir. June 12, 1998), are set forth in the Appendix at 1 and 79. The opinions of the United States District Court for the Northern District of Illinois granting the petitioners' motion to dismiss certain counts in the Second Superseding Indictment, *United States v. Palumbo Bros., Inc.*, No. 96 CR 613, 1997 U.S. Dist. LEXIS 12998 (N.D. Ill. Aug. 15, 1997), and denying the respondent's motion for reconsideration, *United States v. Palumbo Bros., Inc.*, No. 96 CR 613, 1997 U.S. Dist. LEXIS 15976; 1997 WL 643618 (N.D. Ill. Oct. 9, 1997), are set forth in the Appendix at 61 and 74.

BASIS FOR JURISDICTION IN THIS COURT

The judgment of the United States Court of Appeals for the Seventh Circuit sought to be reviewed was entered on May 7, 1998. The order of the United States Court of Appeals for the Seventh Circuit denying the petitioners' timely petition for rehearing was entered on June 12, 1998. This Court has jurisdiction to review the judgment in question on a writ of certiorari pursuant to 28 U.S.C. § 1254(1). Rule 29.4(b) or (c) of this Court does not apply.

STATUTES IN QUESTION

This case involves 29 U.S.C. §§ 141-97, 18 U.S.C. § 1027, 18 U.S.C. § 1341, and 18 U.S.C. §§ 1961-68. The pertinent parts of these statutes are set out in the Appendix at 80.

STATEMENT OF THE CASE

In this case, the Seventh Circuit held that alleged breaches of collective bargaining agreements between labor unions and management can serve as the basis for a massive RICO and mail fraud prosecution. This holding effectively criminalizes conduct that heretofore was remedied exclusively under the federal labor laws. The court essentially recognized that, if the identical allegations were the subject of a civil lawsuit, they could not form the basis of a RICO action because they would be subject to the principles of labor preemption and primary jurisdiction. However, the court held that those principles never can apply to a federal criminal prosecution. Thus, the court erroneously reversed a district court's decision which properly held that certain labor-related charges in this case should be dismissed.

On October 3, 1996, a federal grand jury returned an indictment against two affiliated road construction companies, Palumbo Bros., Inc. ("PBI") and Monarch Asphalt Co. ("Monarch"), their principal owners, Peter Palumbo, Joseph Palumbo, and Sebastian Palumbo (these five defendants are referred to collectively as the "Palumbo Defendants"), and three other individuals. The indictment charged the Palumbo Defendants with violating § 1962(c) of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68, and

the mail fraud statute, 18 U.S.C. § 1341, as well as 18 U.S.C. §§ 2, 1001, 1020, and 1027. All of the charges against the Palumbo Defendants arose out of two alleged schemes: (1) an alleged scheme to defraud governmental entities of money by seeking payment for more construction materials than actually were used on road construction projects (the alleged "road fraud" scheme); and (2) an alleged scheme to defraud PBI's and Monarch's unionized employees of money to which they purportedly were entitled under their collective bargaining agreements (the alleged "labor fraud" scheme).

The foundation for the alleged labor fraud scheme was the collective bargaining agreements that PBI and Monarch entered into with the unions that represented many of their employees. The conduct charged as a "labor fraud scheme" was alleged to be wrongful *solely* because it violated the collective bargaining agreements; indeed, without these collective bargaining agreements, there would have been no "property rights" out of which anyone allegedly was defrauded. Specifically, the indictment charged that, over a twenty-one-year period from 1973 through 1994, the Palumbo Defendants deprived their employees of specific wage rates and benefits to which they allegedly were entitled under the collective bargaining agreements. For example, the indictment charged that the Palumbo Defendants paid their employees at a time-and-a-half rate, rather than a double-time rate, for working on Sundays. The indictment charged that, because PBI's and Monarch's employee paychecks, payroll reporting summaries, and contributions to union health and pension funds were sent through the mails, the Palumbo Defendants' failure to

comply fully with the provisions of the collective bargaining agreements constituted violations of the RICO and mail fraud statutes.

On January 10, 1997, the Palumbo Defendants filed a motion to dismiss only the charges in the indictment pertaining to the alleged labor fraud scheme.[1] The Palumbo Defendants asserted that, in bringing those charges, the government was attempting to prosecute them for conduct which, at most, constituted unfair labor practices and breaches of collective bargaining agreements, in violation of the National Labor Relations Act (the "NLRA"), 29 U.S.C. §§ 151-68, and the Labor Management Relations Act (the "LMRA"), 29 U.S.C. §§ 141-97. In their motion to dismiss, the Palumbo Defendants pointed out that, pursuant to the well-settled doctrines of preemption and primary jurisdiction, an alleged RICO violation predicated upon such conduct is preempted by the NLRA and subject to the primary jurisdiction of the National Labor Relations Board (the "NLRB"). The Palumbo Defendants also pointed out that, under well-settled federal case law, a RICO charge which does not seek to vindicate a substantive right derived from a source

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[1] The basis for federal jurisdiction in the United States District Court for the Northern District of Illinois, Eastern Division, the court of first instance, was 18 U.S.C. § 3231. The Palumbo Defendants moved to dismiss those portions of the RICO charge (Count 1) pertaining to the alleged labor fraud scheme, the substantive mail fraud charges pertaining to the alleged labor fraud scheme (Counts 8-30), and the alleged violations of 18 U.S.C. § 1027, which were based upon the alleged labor fraud scheme (Counts 35-42). These charges are hereinafter referred to as the "labor fraud charges." The Palumbo Defendants did not move to dismiss any of the charges pertaining to the alleged road fraud scheme.

other than a collective bargaining agreement, like the RICO charge in this case, is preempted by the LMRA. Finally, the Palumbo Defendants argued that the government's attempt to recast a labor dispute concerning the terms and conditions of employment as a RICO violation subject to heavy fines, imprisonment, and forfeiture violated this country's delicately crafted national labor policy.

On March 3, 1997, the Chicago Federation of Labor ("CFL") filed an *amicus curiae* brief urging the United States District Court for the Northern District of Illinois to dismiss the labor fraud charges pursuant to the doctrine of labor preemption. The CFL is a central labor body chartered by the AFL-CIO, which represents 450,000 employees in Chicago and northern Illinois. The CFL represents virtually all of PBI's and Monarch's unionized employees who purportedly were the victims of the labor fraud scheme alleged in this case.

On August 15, 1997, the United States District Court for the Northern District of Illinois granted the Palumbo Defendants' motion to dismiss the labor fraud charges. Relying upon settled Seventh Circuit precedent, the court held that the labor fraud charges were preempted by the LMRA because the conduct at issue was "unlawful only by virtue of the obligations in the [collective bargaining agreements] . . . [and that] the RICO claim does not seek to vindicate an independent substantive right derived from a source other than the collective bargaining agreement."[2] Appendix ("App.") at 70-71.

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[2] Because the court held that the labor fraud charges were preempted by the LMRA, it initially did not reach the issue of whether the charges also were preempted by the NLRA. However, when the government filed a motion to reconsider,

On October 31, 1997, the government filed a notice of appeal in the United States Court of Appeals for the Seventh Circuit. On appeal, the government argued that the principles of labor preemption and primary jurisdiction never can apply in a criminal case. In response, the Palumbo Defendants pointed out that this Court and other United States courts of appeals have rejected any distinction between civil and criminal cases in interpreting the federal labor laws.

On May 7, 1998, a panel of the United States Court of Appeals for the Seventh Circuit reversed the decision of the district court. The Seventh Circuit assumed in its opinion that the conduct alleged constituted an unfair labor practice. App. at 15 n.3. Nevertheless, it reversed the district court based upon two factors. First, in stark contradiction to its prior decisions, the panel refused to apply the principles of preemption and primary jurisdiction in a case involving "the intersection of federal statutes" because it found that those doctrines are focused exclusively upon the conflict between federal and *state* regulation. App. at 17-20. Second, the panel accepted the government's contention that "federal labor law can never preempt a criminal prosecution." App. at 12. The panel stated that it was asserting "a fundamental principle of criminal law: an indictment and criminal prosecution for a RICO offense cannot be preempted by federal labor law." App. at 44.

On May 21, 1998, the Palumbo Defendants filed a timely petition for rehearing, with a suggestion for

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the district court denied the motion and noted that the labor fraud also might be preempted by the NLRA. App. at 77-78.

rehearing *en banc*. On June 12, 1997, the Seventh Circuit issued a two-sentence order denying the petition.

ARGUMENT IN SUPPORT OF THE PETITION

This Court should grant this petition for writ of certiorari to resolve the critically important question of whether the federal labor laws ever may preempt or otherwise restrict a federal criminal prosecution. In holding that the principles of preemption and primary jurisdiction do not apply to conflicts between intersecting federal statutes, the Seventh Circuit's decision conflicts with the decisions of this Court and other United States courts of appeals. Moreover, in holding that the federal labor laws never may preempt or otherwise restrict a criminal prosecution, even when the alleged conduct is wrongful only by virtue of obligations in collective bargaining agreements, the Seventh Circuit's decision further conflicts with the decisions of this Court and other United States courts of appeals. Finally, by criminalizing unfair labor practices and mere breaches of collective bargaining agreements, the Seventh Circuit's decision conflicts with national labor policy and threatens to disrupt the delicately crafted, comprehensive system that Congress created for resolving disputes between labor and management.

I. The Seventh Circuit's Decision Conflicts with the Decisions of this Court and Other Circuit Courts of Appeals, Which Hold that the Principles of Preemption and Primary Jurisdiction Can Apply in Cases Involving the Intersection of Federal Statutes.

In reversing the district court and reinstating the labor fraud charges, the Seventh Circuit noted that the

doctrines of preemption and primary jurisdiction originally emanated from the Supremacy Clause of the Constitution and were designed to resolve conflicts between federal and state statutes. The court then refused to apply the principles of preemption and primary jurisdiction in this case, because this case does not involve a conflict between federal and state statutes, but rather involves a conflict between intersecting federal statutes. The Seventh Circuit's decision conflicts with the prior decisions of this Court, which recognize that the doctrines of preemption and primary jurisdiction apply to conflicts between the federal labor laws and other federal statutes. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959) ("[w]hen an activity is arguably subject to § 7 or § 8 of the [NLRA], the States *as well as the federal courts* must defer to the exclusive competence of the National Labor Relations Board") (emphasis added); *see also Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 259 n.6 (1994) (noting that the federal labor laws may preclude "a cause of action arising out of a federal statute"); *Vaca v. Sipes*, 386 U.S. 171, 179 (1967) ("neither state *nor federal* courts have jurisdiction over suits directly involving 'activity [which] is arguably subject to § 7 or § 8 of the [NLRA]' ") (quoting *Garmon*, 359 U.S. at 245) (emphasis added).

Further, in refusing to apply the principles of preemption and primary jurisdiction to a conflict between intersecting federal statutes, the Seventh Circuit's decision conflicts with the decisions of the courts of appeals for the First, Eighth, and Tenth circuits. *See Tamburello v. Comm-Tract Corp.*, 67 F.3d 973 (1st Cir. 1995) (holding that RICO claims were preempted by the NLRA because they alleged unfair labor practices and noting that "[a]lthough the *Garmon* [preemption] doctrine, which is rooted in the

Supremacy Clause of the United States Constitution [citation omitted], was originally concerned only with federal supremacy over conflicting state laws, it has been extended to cover the relationship between the NLRA and other federal statutes"); *Brennan v. Chestnut*, 973 F.2d 644 (8th Cir. 1992) (holding that RICO claim based upon mail fraud and wire fraud predicates was preempted because "the court must look to the labor laws to define the fraud"); *see also Fry v. Airline Pilots Assoc., Int'l*, 88 F.3d 831 (10th Cir. 1996) (holding that RICO claim was preempted by the federal labor laws because it called for an interpretation of a collective bargaining agreement).[3]

Despite the weight of authority establishing that the principles of preemption and primary jurisdiction apply to conflicts between intersecting federal statutes, two courts of appeals have agreed with the Seventh Circuit in

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[3] *Accord Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186 (1st Cir. 1990) (holding that claim under the Civil Rights Act of 1964 was preempted by the NLRA because it hinged upon whether an unfair labor practice occurred); *Teamsters Local 372 v. Detroit Newspapers*, 956 F. Supp. 753 (E.D. Mich. 1997) (dismissing labor-related predicates from RICO claim and noting that the doctrines of preemption and primary jurisdiction have "been extended to cover the relationship between the NLRA and other federal statutes"); *Mann v. Air Line Pilots Assoc.*, 848 F. Supp. 990 (S.D. Fla. 1994) (holding that RICO claim was preempted by federal labor laws); *MHC, Inc. v. International Union, United Mine Workers of America*, 685 F. Supp. 1370 (E.D. Ky. 1988) (holding that RICO claim was preempted by NLRA because claim depended wholly upon whether a violation of labor law occurred); *Butchers' Union, Local No. 498 v. SDC Investment, Inc.*, 631 F. Supp. 1001 (E.D. Cal. 1986) (holding that RICO claim was preempted by the NLRA); *Local 355, Hotel, Motel, Restaurant & Hi-Rise Employees and Bartenders Union v. Pier 66 Co.*, 599 F. Supp. 761 (S.D. Fla. 1984) (holding that RICO claim was preempted by the NLRA).

expressing reluctance to apply those principles to such conflicts. *See United States v. International Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 948 F.2d 98 (2d Cir. 1991); *United States v. Boffa*, 688 F.2d 919 (3d Cir. 1982);[4] *see also Smith v. National Steel & Shipbuilding Co.*, 125 F.3d 751 (9th Cir. 1997) (expressing concern about applying principles of preemption and primary jurisdiction to conflicts between federal statutes but noting that the NLRA does "preempt a federal claim when that federal claim depends upon the NLRA to state the federal cause of action").[5] Subsequent district court decisions in both the Second and Third circuits, however, simply have ignored this concern and applied principles of preemption and primary jurisdiction to conflicts between intersecting federal statutes. *See Trans World Airlines, Inc. v.*

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[4] *Accord Hood v. Smith's Transfer Corp.*, 762 F. Supp. 1274 (W.D. Ky. 1991); *United Food and Commercial Workers, Local 400 v. Marval Poultry Co., Inc.*, 708 F. Supp. 761 (W.D. Va. 1989).

[5] The law in the Ninth Circuit on this issue is somewhat unsettled. *See Hubbard v. United Airlines, Inc.*, 927 F.2d 1094 (9th Cir. 1991) (holding that RICO claims were preempted by the RLA because "the duty, the violation which formed the predicate acts for the RICO claims, arose entirely out of the [collective bargaining agreement]"); *Petrochem Insulation, Inc. v. Northern California and Northern Nevada Pipe Trades Council*, No. C-90-3628 EFL, 1991 U.S. Dist. LEXIS 6659 (N.D. Cal. April 30, 1991) (holding that RICO claim was preempted by the NLRA because the underlying conduct was "wrongful only by virtue of the labor laws"); *Butchers' Union*, 631 F. Supp. 1001 (holding that RICO claim based upon mail and wire fraud predicates was preempted by the NLRA because "the only reason defendants' conduct can be alleged to be unlawful, is that it is denounced by the labor laws"); *but see Brock v. Writers Guild of America, West, Inc.*, 762 F.2d 1349 (9th Cir. 1985) (holding that principles of preemption do not apply to "questions concerning the overlap of two federal statutes").

Sinicropi, 887 F. Supp. 595 (S.D.N.Y. 1995) (holding that ERISA claims were preempted by the Railway Labor Act and noting that "the federal/state distinction appears to be of no significance to a proper analysis of when preemption is required") (citing *Hawaiian Airlines*, 512 U.S. at 259 n.6), *aff'd*, 84 F.3d 116 (2d Cir. 1996); *Franks v. O'Connor Corp.*, Civ. A. No. 92-0947, 1992 WL 301266 (E.D. Pa. 1992) (holding that RICO claim was preempted because "[t]he only reason defendants' conduct can be alleged to be unlawful is that the defendant did not pay wages it had agreed to pay under the Collective Bargaining Agreement"). This confusing state of the law recently provoked one district court in the Second Circuit to opine that the "disparity among federal courts – the unsurprising outgrowth of Congress' failure to articulate what boundaries, if any, should be drawn between the NLRA and RICO – must ultimately be resolved by Congress or the Supreme Court." *A. Terzi Prod., Inc. v. Theatrical Protective Union*, 2 F. Supp. 2d 485, 504 (S.D.N.Y. 1998).[6]

Indeed, in refusing to apply the principles of preemption and primary jurisdiction to a conflict between intersecting federal statutes, the Seventh Circuit's decision conflicts with its own prior decisions. *See Talbot v. Robert Matthews Distrib. Co.*, 961 F.2d 654 (7th Cir. 1992)

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[6] The state of the law on this issue in the Fifth Circuit also is somewhat unclear. *See Britt v. Grocers Supply Co., Inc.*, 978 F.2d 1441 (5th Cir. 1992) (noting that, "[b]ecause the preemption doctrine lies in the tension between federal and state regulation of labor relations, the analysis of the tension between two conflicting federal statutes is somewhat different" and holding that a claim under the ADEA was not preempted by the NLRA); *but see Hobbs v. Hawkins*, 968 F.2d 471 (5th Cir. 1992) (holding that § 1983 claim was preempted by the NLRA).

(holding that RICO claim was preempted by the NLRA and noting that preemption is "designed to protect the primary jurisdiction of the NLRB from *federal* and state courts") (emphasis added); *see also Underwood v. Venango River Corp.*, 995 F.2d 677 (7th Cir. 1993) (holding that RICO claim "alleging generic wire and mail fraud" was preempted by the federal labor laws because the only rights that the plaintiffs sought to vindicate "originated in a collective bargaining agreement"), *overruled on other grounds in Hawaiian Airlines*, 512 U.S. 246.[7]

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[7] Following the Seventh Circuit's lead in *Talbot* and *Underwood*, district courts within the Seventh Circuit consistently hold that the principles of preemption and primary jurisdiction apply to conflicts between intersecting federal statutes. *See, e.g., Chicago Dist. Council of Carpenters Pension Fund v. Ceiling Wall Systems, Inc.*, 915 F. Supp. 939 (N.D. Ill. 1996) (holding that RICO claim was preempted by the LMRA because it did "not seek to vindicate an independent substantive right derived from a source other than the collective bargaining agreement"); *Buck Creek Coal, Inc. v. United Mine Workers of America*, 917 F. Supp. 601 (S.D. Ind. 1995) (holding that RICO claim was preempted by the NLRA because reading the RICO statute broadly enough to encompass conduct in labor disputes "would not only 'fly in the face of the statute's language and purpose, but would work a major restructuring of [the] legal landscape' ") (quoting *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 913 F.2d 948, 954 (D.C. Cir. 1990); *McDonough v. Gencorp, Inc.*, 750 F. Supp. 368 (S.D. Ill. 1990) (holding that RICO claim was preempted by the NLRA because the mail and wire fraud predicates were "based solely upon labor law violations"); *Brown v. Keystone Consol. Indus., Inc.*, 680 F. Supp. 1212 (N.D. Ill. 1988) (holding that RICO claim was preempted by the NLRA because the underlying conduct, couched in terms of "generic" mail and wire fraud allegations, was "wrongful only by virtue of the labor laws"); *Chicago Dist. Council of Carpenters Pension Fund v. Juell*, No. 84 C 7467, 1987 WL 13667 (N.D. Ill. July 2, 1987) (holding that RICO claim was

The Seventh Circuit attempted to distinguish *Talbot* and *Underwood* from this case by creating a new rule: that principles of primary jurisdiction and preemption apply when federal statutes intersect in civil cases like *Talbot* and *Underwood*, but not when those same statutes intersect in criminal cases like this case. The court's attempt to clarify the meaning of *Talbot* and *Underwood* was unsuccessful, however. As one district court recently noted, the Seventh Circuit's decision in this case substantially "muddied the water" surrounding the question of whether the principles of preemption and primary jurisdiction can apply to conflicts between intersecting federal statutes. *Mariah Boat, Inc. v. Laborers Int'l Union of North America*, No. 97-CV-4270-JPG, 1998 WL 527241, *4 (S.D. Ill. June 17, 1998) (analyzing the Seventh Circuit's decision in this case but ultimately returning to the state of the law in the Seventh Circuit prior to this decision by holding that the NLRA "preempts other federal statutes when the underlying conduct is actionable only by virtue of the NLRA"). *Compare id. with Talbot*, 961 F.2d at 662 ("Here, the underlying conduct of the plaintiffs' RICO claim is wrongful only by virtue of the labor laws, therefore the claim is preempted under the NLRA.").

Thus, the majority of federal courts that have considered the issue have held that the principles of preemption

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preempted by the LMRA because the alleged mail and wire fraud allegations were "inextricably linked with the obligations imposed by the collective bargaining agreement and defendants' unfair labor practices in applying those agreements" and "to hold otherwise would allow the RICO statute to subvert and consume much of the specialized administrative system Congress established to obtain uniform application of the substantive federal labor laws").

and primary jurisdiction apply to conflicts between intersecting federal statutes, particularly when the conduct at issue is, as in this case, wrongful only by virtue of the labor laws. A minority of the federal courts have expressed reluctance to apply the principles of preemption and primary jurisdiction to conflicts between intersecting federal statutes, but that reluctance often has been ignored by other federal courts within those same circuits. In this decision, the Seventh Circuit embarks upon an illogical third approach to resolving the issue – the decision holds that the principles of preemption and primary jurisdiction do not apply to conflicts between intersecting federal statutes if they arise in *criminal* cases, but do apply to conflicts between those exact same federal statutes if they arise in *civil* cases. This unprecedented third approach not only significantly "muddies the water" as one district court already has noted, it also is premised upon an unsupportable distinction between civil and criminal cases – a distinction that this Court and other federal courts uniformly reject.

II. The Seventh Circuit's Decision Conflicts with the Decisions of this Court and Other Circuit Courts of Appeals, Which Hold that the Federal Labor Laws Can Restrict Federal Criminal Prosecutions and Which Reject Any Distinction Between Civil and Criminal Cases in Interpreting the Federal Labor Laws.

In reversing the decision of the district court, the Seventh Circuit reinstated RICO and mail fraud charges predicated solely upon PBI's and Monarch's alleged failure to comply fully with certain wage and benefit provisions in collective bargaining agreements. The court based its decision upon the fact that these allegations were charged in a criminal case, rather than in a civil

case. The court essentially acknowledged that, if the identical allegations were the subject of a civil lawsuit between the road construction companies and their unionized employees, the allegations would be preempted by the NLRA and the LMRA. *See* App. at 40-41 (recognizing that, "[i]f this case involved a civil RICO claim brought by Palumbo employees or the Unions," then an "unresolvable conflict between labor law and civil RICO may emerge and preemption may be required"). However, the Seventh Circuit ruled that, unlike a civil case, a criminal case never can be preempted or otherwise restricted by the federal labor laws. App. at 44. That ruling conflicts with the prior decisions of this Court.

In *United States v. Hutcheson*, 312 U.S. 219 (1941), this Court held that the federal labor laws indeed can restrict a federal criminal prosecution predicated upon conduct arising out of a labor dispute. Moreover, this Court explicitly rejected any proposed distinction between civil and criminal cases in determining the types of conduct Congress sought to circumscribe exclusively within the statutory framework of the federal labor laws. *See id.* at 234-35. In *Hutcheson*, a federal grand jury indicted several union officials for allegedly forming a criminal combination and conspiracy in violation of the Sherman Act. *Id.* at 228. The defendants argued that their conduct was covered by the federal labor laws – specifically Section 20 of the Clayton Act, 29 U.S.C. § 52, as extrapolated by the Norris-LaGuardia Act, 29 U.S.C. § 113 – and therefore could not serve as the basis for a criminal prosecution. *Id.* at 229-31. In response, the government asserted that the defendants could not invoke Section 20 of the Clayton Act, as extrapolated by the Norris-LaGuardia Act,

because they were charged in a criminal case, rather than in a civil case. *Id.* at 234-35. The government acknowledged that the charges in the indictment could not serve as the basis for an injunction in a civil lawsuit brought by either the government or the purported victim of their conduct. *Id.* at 227 ("[c]oncedely an injunction either at the suit of the Government or the employer could not issue"). However, the government argued that, because the defendants were charged in a criminal case, the Norris-LaGuardia Act did not apply. *Id.* at 234-35. The government asserted that the Norris-LaGuardia Act, on its face, pertained only to injunctions and, thus, only to civil cases. *Id.* The government contended that, while the Norris-LaGuardia Act might have prohibited a party in a civil lawsuit from seeking to enjoin the charged conduct, it could not be invoked by defendants in a criminal case. *Id.*

The Court rejected the government's proposed distinction between civil and criminal cases in construing the reach of the federal labor laws. *Id.* The Court held that, although nothing in the Norris-LaGuardia Act specifically indicated that it applied to criminal as well as civil cases, that clearly was Congress' intent. *Id.* Writing for the majority, Justice Frankfurter stated:

> To be sure, Congress expressed this national policy and determined the bounds of a labor dispute in an act explicitly dealing with the further withdrawal of injunctions in labor controversies. But to argue, as it was urged before us, that [the Act does not apply] for purposes of a criminal prosecution is to say that that which on the equity side of the court is allowable conduct may in a criminal proceeding become the road to prison. It would be strange indeed that although neither the Government nor [the

> purported victim] could have sought an injunction against the acts here challenged, [Congress'] elaborate efforts to permit such conduct failed to prevent criminal liability punishable with imprisonment and heavy fines. That is not the way to read the will of Congress, particularly when expressed by a statute which, as we have already indicated, is practically and historically one of a series of enactments touching one of the most sensitive national problems. Such legislation must not be read in a spirit of mutilating narrowness.

Id. at 235.

Almost sixty years after this Court rejected a distinction between civil and criminal cases in interpreting the federal labor laws, the government in this case nevertheless has advocated for the courts to graft such a distinction onto the federal labor laws. Before the Seventh Circuit, the government argued that, because the NLRA and LMRA do not, on their face, specify that they apply to criminal as well as civil cases, the courts should ignore their preemptive effect in criminal cases. That is precisely the argument that the government made in *Hutcheson* with respect to the Norris-LaGuardia Act.[8] This Court,

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[8] Many of the government's arguments in this case echo, almost verbatim, the concerns expressed in Justice Roberts' dissent in *Hutcheson*. Justice Roberts began his dissent by asserting, as the government has in this case, that the defendants' alleged conduct falls squarely within the language of the federal criminal statute at issue. *Id.* at 243. He chastised the majority for concluding that, by enacting the Clayton Act and the Norris-LaGuardia Act, Congress "intended to repeal the provisions of" the criminal statute. *Id.* at 245. Justice Roberts maintained that the majority was unjustified in effecting an "implied repeal" of a federal criminal statute. *Id.* Although the

however, recognizing the broad Congressional purpose underlying the federal labor laws, rejected the government's formalistic argument and held that the federal labor laws apply equally in civil and criminal cases. The Seventh Circuit's decision to graft such an artificial distinction onto the NLRA and the LMRA conflicts with this Court's holding in *Hutcheson*. *See also English v. General Electric Co.*, 496 U.S. 72, 83 (1990) (rejecting the notion that preemption can apply in civil cases but not in criminal cases).

The Seventh Circuit's decision also conflicts with this Court's decision in *United States v. Enmons*, 410 U.S. 396 (1973). In *Enmons*, this Court upheld the dismissal of an indictment that charged the defendants with violating the Hobbs Act, 18 U.S.C. § 1951, during a labor dispute. The Hobbs Act makes it unlawful to obstruct commerce by means of extortion. 18 U.S.C. § 1951; *see Enmons*, 410 U.S. at 397. The statute defines extortion as "obtaining property from another, with his consent, induced by the wrongful use of actual or threatened force, violence, or fear. . . ." *See* 18 U.S.C. § 1951(b)(2). The indictment in *Enmons* charged that the defendants, who were union officials, violated the Hobbs Act by using the threat of violence "to obtain for the striking employees higher wages and other employment benefits." *Enmons*, 410 U.S. at 398.

This Court rejected the government's expansive interpretation of the statute to encompass acts of violence committed in the context of a labor dispute. *Id.* at 410-11. The Court found that such a broad interpretation was unfounded "for two related reasons." *Id.* at 411. First, the Court noted that, because the Hobbs Act was "a criminal

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majority of this Court rejected the reasoning of Justice Roberts' dissent sixty years ago, the Seventh Circuit essentially adopted its reasoning in this case.

statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity." *Id.* Second, the Court held that:

> [I]t would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law.

Id. Recognizing that Congress sought to circumscribe the role of federal regulation in labor-management relations to enforcing the rights and duties contained in the NLRA, the Court refused to read the Hobbs Act as expanding that role to policing acts of violence perpetrated in the context of labor disputes, absent an explicit Congressional mandate to do so. *Id.* Concerned that the government's interpretation of the Hobbs Act would transform minor acts of violence committed during the collective bargaining process into federal felonies punishable by imprisonment and heavy fines, the Court upheld the dismissal of the indictment.[9] *Id.*

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[9] Courts interpreting this Court's decision in *Enmons* uniformly recognize that this Court carved out a "labor exception" to the prohibited conduct set forth in the Hobbs Act. *See, e.g., United States v. Castor*, 937 F.2d 293, 299 (7th Cir. 1991); *United States v. Robilotto*, 828 F.2d 940, 945 (2d Cir. 1987); *United States v. Cohen*, 738 F.2d 287, 289 (8th Cir. 1984); *United States v. Zappola*, 677 F.2d 264, 269 (2d Cir. 1982); *United States v. Porcaro*, 648 F.2d 753, 760 (1st Cir. 1981); *United States v. Cerilli*, 603 F.2d 415, 419-20 (3d Cir. 1979); *United States v. Warledo*, 557 F.2d 721, 729-30 (10th Cir. 1977); *United States v. Agnes*, 581 F. Supp. 462, 470-71 (E.D. Pa. 1984).

The Seventh Circuit's decision in this case conflicts with this Court's decision in *Enmons* on at least two levels. First, in holding that federal criminal prosecutions never can be restricted by the federal labor laws, the Seventh Circuit's decision conflicts with this Court's ruling in *Enmons* (as in *Hutcheson*) that they can. Second, the Seventh Circuit's decision conflicts with *Enmons* by failing to heed this Court's admonition to refrain from interpreting federal criminal statutes so broadly that they substantially expand the federal government's role in regulating labor-management relations far beyond the statutory framework established in the federal labor laws.

In *Enmons*, this Court held that Congress did not intend for the Hobbs Act to place the federal government in the position of policing minor acts of violence committed during labor disputes. In contrast, the Seventh Circuit's decision in this case fails to recognize that Congress did not intend for the RICO statute to place federal prosecutors in the position of enforcing wage and benefits provisions in collective bargaining agreements. Congress created a framework for resolving disputes over the terms and conditions of collective bargaining agreements. That framework provides for § 301 claims and arbitration to enforce provisions in collective bargaining agreements and creates a centralized administrative agency to determine when certain conduct constitutes an unfair labor practice. By enacting RICO, Congress did not intend to grant federal prosecutors the unbridled authority to enforce their own interpretations of provisions in collective bargaining agreements with the threat of imprisonment, forfeiture, and heavy fines.[10]

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[10] Further, the Department of Justice could not possibly police all of the collective bargaining agreements in the United

Rather, when it enacted RICO, Congress was selective in determining which types of labor-related conduct could serve as predicate criminal activity. Out of the more than fifty federal statutes listed as possible predicate acts under RICO, only four statutes relate, even tangentially, to the labor arena. *See* 18 U.S.C. § 1961(1) (listing the following labor-related statutes as potential racketeering acts under RICO: 18 U.S.C. § 664, 18 U.S.C. § 1954, 29 U.S.C. § 186, 29 U.S.C. § 501(c)). Congress did not include violations of the NLRA or the LMRA as predicate acts under RICO. Thus, Congress did not include the types of conduct charged in this case – failures to comply fully with wage and benefits provisions in collective bargaining agreements – as predicate acts under RICO because Congress already enacted a comprehensive statutory framework for addressing and remedying such violations. By interpreting the RICO statute broadly enough to encompass conduct which Congress expressly chose not to include as predicate activity under RICO, the Seventh Circuit engages in the worst kind of judicial activism and runs afoul of the principles set forth in *Enmons*. *See also Brennan v. Chestnut*, 973 F.2d 644, 646-47 (8th Cir. 1992) ("[t]he fact that no other labor statute is mentioned in the RICO statute suggests that violations of labor laws other than [29 U.S.C.] § 186 alleged as predicate acts are preempted").[11]

States to ensure that the parties abide by the terms and conditions contained therein. Rather, under the Seventh Circuit's decision, the Department of Justice will be allowed to arbitrarily decide which collective bargaining agreements it will seek to enforce. Such selective enforcement inevitably will lead to abuses.

[11] RICO is based upon the antitrust statutes. *See, e.g., Holmes v. Security Investor Protection Corp.*, 503 U.S. 258, 267

Moreover, by expanding the mail fraud statute to encompass breaches of collective bargaining agreements and unfair labor practices, the Seventh Circuit diverges not only from the principles articulated in *Enmons*, but also from the majority of courts that have considered the issue. As this Court noted, the mail fraud statute forbids "use of the mails 'for the purpose of executing [a] scheme to defraud,' " but leaves the definition of "what conduct may constitute such a scheme for determination under other laws." *United States v. Parr*, 363 U.S. 370, 389 (1960) (quoting 18 U.S.C. § 1341). Recognizing this, most courts have held that RICO claims predicated upon mail fraud violations are preempted by the federal labor laws if the "court must look to labor laws to define the fraud." *Brennan*, 973 F.2d at 646; *see also Butchers' Union v. SDC Investment, Inc.*, 631 F. Supp. 1001, 1011 (E.D. Cal. 1986) (holding that RICO claim was preempted because, "but for the proscriptions of labor law, defendants' conduct simply would not be either mail fraud or wire fraud").

The Seventh Circuit's decision also conflicts with the Second Circuit's holding that the federal labor laws can restrict a federal criminal prosecution. In *United States v. DeLaurentis*, 491 F.2d 208 (2d Cir. 1974), the Second Circuit held that allegedly unfair labor practices could not serve as a basis for a federal criminal prosecution. The

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(1992) (collecting cases). Both Congress and this Court explicitly have recognized that labor-related conduct is exempted from the reach of the antitrust statutes. *See, e.g., Brown v. Professional Football, Inc.*, 116 S. Ct. 2116, 2120 (1996). The RICO statute should not be interpreted more broadly than the statutes upon which it was based.

indictment charged the defendants, who were union officials, with violating the 1870 Civil Rights statute by forcing union members to participate in a sit-in against their will. *Id.* at 210. The 1870 Civil Rights statute makes it unlawful to "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States. . . . " *Id.* (quoting 18 U.S.C. § 241). The government argued that the defendants' conduct clearly fell within the language of the statute. *Id.* at 211. The government asserted that the defendants conspired to threaten or intimidate various union members in the exercise of their right not to join the sit-in – a right secured to them by the 1947 Taft-Hartley amendments to the NLRA, 29 U.S.C. § 157 (setting forth the right "to refrain from any or all [concerted] activities"). *Id.*

The Second Circuit rejected the government's argument. The court held that the rights specified in the NLRA "must be vindicated exclusively through the procedures set forth in that Act and may not serve as the basis for a prosecution. . . . " *Id.* Relying on this Court's decision in *Enmons*, the Second Circuit ruled that "criminal penalties were not intended for violations of the National Labor Relations Act," *id.* at 212, and that the government had "unjustifiably used federal law to convert an unfair labor practice into a criminal conspiracy." *Id.* at 214. As the court recognized, the question of whether a right exists under the NLRA "and whether or not that right has been violated are frequently complex questions of fact and law – hardly issues that are best resolved by a jury in a criminal trial." *Id.* at 213.

The court noted that the "care and compromise" Congress took in enacting the federal labor laws "suggest

that Congress would not silently import sweeping criminal liability into the regulation of labor relations." *Id.* at 214. Thus, the court recognized that the "huge expansion of federal criminal liability of employer and union officials envisioned by the Government would be a shock to . . . Congress." *Id.* As the court acknowledged, it is "unreasonable to believe" that Congress would expressly provide that a violation of the NLRA would "constitute only an unfair labor practice, without even a fine or any punishment as a misdemeanor," but would seek to punish the identical conduct "as a ten year felony." *Id.* at 213. *See also United States v. Bailes*, 120 F. Supp. 614, 632-33 (S.D. W. Va. 1954) (dismissing indictment based upon the same reasoning adopted in *DeLaurentis* and stating that "Congress did not intend to subject violations of rights described in [the LMRA] to Federal criminal prosecution").

The Seventh Circuit's decision directly contradicts the Second Circuit's decision in *DeLaurentis*. Contrary to *DeLaurentis*, the Seventh Circuit held that the federal labor laws never can restrict a federal criminal prosecution. Contrary to *DeLaurentis*, the Seventh Circuit held that the rights enumerated in the federal labor laws need *not* be vindicated exclusively through the procedures set forth in those laws and may *indeed* serve as the basis for a prosecution. Contrary to *DeLaurentis*, the Seventh Circuit held that conduct which heretofore constituted *only* an unfair labor practice may *now* be punished by imprisonment and heavy fines. Contrary to *DeLaurentis*, the Seventh Circuit held that Congress *indeed* intended to silently import sweeping criminal liability into the regulation of

labor relations.[12] The two decisions cannot be squared in any principled fashion, and this Court should grant a writ of certiorari to resolve the conflict.

III. The Seventh Circuit's Decision Conflicts with this Country's National Labor Policy by Criminalizing Unfair Labor Practices and Breaches of Collective Bargaining Agreements.

Finally, the Seventh Circuit's decision conflicts with this country's national labor policy by undermining the remedial purpose underlying the federal labor laws. Congress never intended to criminalize unfair labor practices and failures to comply fully with certain provisions in collective bargaining agreements. Federal labor law has been delicately crafted to serve the goal of industrial peace and stability through collective bargaining. *See Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 271 (1964); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937). When Congress enacted the NLRA in 1935, it

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[12] In fact, by holding that federal labor law never can restrict federal criminal prosecutions, the Seventh Circuit's decision also contradicts the Third Circuit's decision in *United States v. Boffa*, 688 F.2d 919 (3d Cir. 1982), the only case upon which the Seventh Circuit ostensibly relies. In *Boffa*, the Third Circuit held that a criminal prosecution concerning the defendants' alleged scheme to deprive their employees of NLRA § 7 rights was not cognizable under the mail fraud statute. *Id.* at 930 ("Congress did not envision that the mail fraud statute would serve as an exception to its policy of insuring a uniform interpretation of the NLRA by an administrative agency with special expertise in the labor area"). The Seventh Circuit's opinion, by holding that unfair labor practices indeed may be criminalized, and by encompassing within its holding both § 7 and § 8 rights under the NLRA, *see* App. at 15 n.3, directly contradicts that aspect of *Boffa*.

circumscribed the role of federal intervention in labor relations solely to maintaining an atmosphere in which free collective negotiations could occur and to providing a framework through which remedies could be secured when necessary. *See First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 674 (1981). While Congress certainly could have imposed criminal sanctions for unfair labor practices or breaches of collective bargaining agreements, it expressly chose not to do so. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940). Indeed, as this Court repeatedly has held, this country's national labor policy is remedial, not punitive. *See NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 250 (1939); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938). Congress explicitly chose not to brand parties who transgress the boundaries of fair labor practice as "outlaws." *NLRB v. Townhouse T.V. & Appliances, Inc.*, 531 F.2d 826, 831 (7th Cir. 1976).

The NLRA sets forth the rights and responsibilities of employers, employees, and unions in the collective bargaining processes. The NLRA also establishes a system of remedies for violations of its provisions. It "is a comprehensive code passed by Congress to regulate labor relations in activities affecting interstate and foreign commerce." *Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 238 (1967). To ensure uniformity in the interpretation of labor law, conduct that actually or arguably constitutes an unfair labor practice is reviewed exclusively by the NLRB. *See* 29 U.S.C. §§ 159-60; *NLRB v. Weingarten*, 420 U.S. 251, 266 (1975); *Garmon*, 359 U.S. at 243-44.

The labor fraud charges at issue in this case should be addressed within the federal labor law context, not in a criminal prosecution. The Seventh Circuit assumed, for purposes of the appeal, that the conduct charged in the

indictment constituted an unfair labor practice. App. at 15 n. 3; *see* 29 U.S.C. § 158(a)(5); *Carpenters S. Cal. Admin. Corp. v. J.L.M. Constr. Co., Inc.*, 809 F.2d 594, 598-99 (9th Cir. 1987) (holding that the overt refusal to comply with terms of labor contract constitutes a *de facto* repudiation, and therefore a violation of § 8(a)(5) of the NLRA), *vacated on other grounds*, 840 F.2d 723 (9th Cir. 1988). Thus, if the purportedly aggrieved unions or employees filed a charge under § 8(a)(5) of the NLRA, the conduct would be subject to the primary jurisdiction of the NLRB. *See* 29 U.S.C. §§ 159-60; *Garmon*, 359 U.S. at 243-44. Instead of being subjected to a criminal indictment, the pretrial restraint of assets, and paralyzing forfeiture allegations, the employer could remain in operation and present its position to the specialized administrative agency designated by Congress to resolve such disputes – not a lay jury unversed in the intricacies of labor-management relations.[13]

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[13] The NLRB would consider technical issues of labor law, including: (1) whether the collective bargaining agreements at issue actually required the Palumbo Defendants to pay wages in the manner alleged; (2) whether the parties, by their conduct, amended the terms of the collective bargaining agreements relating to the payment of such wages; (3) whether the employees relinquished any right to certain wages and benefits by failing to comply with the express grievance procedures under the terms of the collective bargaining agreements; (4) whether, under the terms of the collective bargaining agreements, the unions or employees acquiesced in, and therefore accepted, new wage-related terms; (5) whether the Palumbo Defendants' method of paying wages became part of the collective bargaining agreements because it was their past practice; and (6) whether the Palumbo Defendants' method of paying wages became part of the collective bargaining agreements because it was industry practice. *See generally* 1 The

The Seventh Circuit's decision will require a criminal jury to delve into the intricacies of the collective bargaining agreements at issue and the parties' course of conduct relating to those agreements. In that respect, the decision clearly conflicts with this country's federal labor policy as interpreted by this Court. *See Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960). The decision also criminalizes unfair labor practices and purported breaches of collective bargaining agreements. In doing so, it contravenes the broad remedial purpose underlying the federal labor laws. Disputes between labor and management are part of the fabric of ongoing relationships. Despite conflicts and transgressions, however, the parties must continue to get along. The federal labor laws take this into account and focus more upon rebuilding the relationship than upon exacting punishment upon the parties. By taking this dispute out of the labor arena, the Seventh Circuit's decision gives both labor and management an incentive to run to federal prosecutors instead of bargaining to impasse.

Developing Labor Law 699-710 (3d ed. 1992) (discussing various NLRB decisions interpreting collective bargaining agreements). These issues are within the exclusive province of federal labor law and should be decided by the NLRB – not by a prosecutor, district court, or jury in a criminal proceeding. As this Court recognized, even "[t]he ablest judge cannot be expected to bring the same experience and competence to bear upon [such issues] because he cannot be similarly informed." *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *see also DeLaurentis*, 491 F.2d at 211-14.

Indeed, allowing the government to proceed with its prosecution of the alleged labor fraud could touch off adverse consequences of immense proportion that could seriously jeopardize the delicate balance between labor and management achieved under the federal labor laws. The failure to comply with basic provisions in collective bargaining agreements could be charged as federal crimes. Unions, management, and their officers could be subject to criminal prosecution for routine disputes over the terms and conditions of employment. The decision also may render individuals, unions, and companies vulnerable to civil RICO actions for treble damages based solely upon unfair labor practices or breaches of collective bargaining agreements.[14]

Unless this Court grants a writ of certiorari and overturns the Seventh Circuit's decision, a third party – the federal prosecutor – will join collective bargaining tables across the nation, undermining this country's delicately crafted labor policy and frustrating the collective bargaining process. That third party will be allowed to disregard agreements reached between employers and employees and unilaterally impose its will by utilizing the sanctions of imprisonment and heavy fines. That third party will be permitted to disrupt the harmony that labor and management have achieved over the course of decades, crippling established businesses and eliminating a multitude of unionized jobs. Congress and this Court have labored diligently over the past century to prevent

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[14] Organized labor clearly recognizes the dangers that inevitably will flow from allowing this prosecution to proceed. In this case, both the CFL (in the district court) and the AFL-CIO (in the Seventh Circuit) submitted briefs advocating that the labor fraud charges should be dismissed.

precisely this kind of federal intrusion into the realm of labor relations. This Court should not allow the Seventh Circuit's decision to derail those efforts.

Respectfully submitted,

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APPENDIX

APPENDIX

In the
United States Court of Appeals
for the Seventh Circuit

No. 97-3807

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

PALUMBO BROTHERS, INC., formerly doing business as LEININGER MID-STATES PAVING CO. and as PALUMBO EXCAVATING CO., MONARCH ASPHALT CO., PETER A. PALUMBO, JOSEPH PALUMBO, SEBASTIAN PALUMBO, KELSON ABDISHI, DANIEL FERRARINI, and GERALD MCGREEVY,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 CR 613 – **Elaine E. Bucklo,** *Judge.*

ARGUED JANUARY 20, 1998 – DECIDED MAY 7, 1998

Before BAUER, COFFEY, and ROVNER, *Circuit Judges.*

BAUER, *Circuit Judge.* A federal grand jury returned an indictment against Palumbo Brothers, Inc., Monarch Asphalt Co., Peter Palumbo, Joseph Palumbo, Sebastian Palumbo, Kelson Abdishi, Daniel Ferrarini, and Gerald

McGreevy, alleging various criminal activities in conjunction with schemes to defraud employees, unions, and various governmental entities. The indictment charges, *inter alia*: (1) predicate acts of mail and wire fraud in a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*; (2) substantive acts of mail fraud, in violation of 18 U.S.C. § 1341; and (3) the submission of false statements, in violation of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*

In two separate motions, the defendants sought the dismissal of portions of a forty-four count indictment. In the first motion, the defendants collectively moved to dismiss Racketeering Acts 1 and 2 in Count 1, Counts 8 through 30, and Counts 35 through 42 of the indictment. The defendants argued that: (1) the indictment fails to charge them with criminal violations of RICO, mail fraud, and ERISA, but instead alleges unfair labor practices and breaches of collective bargaining agreements in violation of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.*, and the Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 141-197; and (2) those labor statutes preempt the criminal prosecution of labor-related activities. In the second motion, Ferrarini individually moved to dismiss Count 1 of the indictment in its entirety. Ferrarini argued that: (1) the essential elements of a RICO offense are not sufficiently stated in the indictment; and (2) therefore, the indictment fails to charge him with a criminal violation of RICO. In separate memorandum opinions and orders, the district court granted both motions.

The United States now appeals, arguing that the district court erroneously granted the defendants' motions to dismiss. The government asserts that: (1) neither the NLRA nor § 301 of the LMRA preempts a criminal prosecution, even though the defendants' conduct arguably falls within the scope of federal labor law; and (2) the continuity of a defendant's predicate acts is not an essential element of a RICO offense, and the indictment sufficiently charges Ferrarini with a criminal violation of RICO. For the reasons set forth below, we reverse.

Statement of Facts

Palumbo Brothers, Inc. ("PBI") and Monarch Asphalt Co. ("Monarch") were two major road construction firms in Chicago, Illinois engaged in various projects and activities relating to the construction, maintenance, and repair of streets and expressways in Chicago and its surrounding suburbs. The Palumbo firms entered into construction and repair contracts with, among others, the Illinois Department of Transportation ("IDOT"), the Illinois State Toll Highway Authority, and local municipalities throughout the Chicago area.

Throughout the relevant time period of the defendants' alleged criminal activities, PBI and Monarch were owned and controlled by members of the Palumbo family, including principal owners Peter Palumbo, Joseph Palumbo, and Sebastian Palumbo. In various positions within PBI and Monarch, the individual Palumbo defendants were responsible for overseeing various administrative functions, which included, *inter alia*: (1) the general administration of the firms' construction and

repair contracts; (2) routine supervision of those projects; (3) the payment and collection of funds; (4) the development and implementation of payroll, wage, and contribution policies; and (5) various matters involving labor relations and labor contracts.

Kelson Abdishi was employed by IDOT as a Resident Engineer from 1972 through 1991, and his duties included on-site supervision of various Palumbo projects to ensure the roads and highways were constructed and repaired according to contract specifications and in compliance with IDOT regulations. Abdishi also was required to monitor the completion of those projects to ensure that PBI and Monarch were paid only for work performed and materials actually used. Daniel Ferrarini was employed by PBI as a Plant Supervisor at its Dundee, Illinois plant, and he was responsible for supervising the production and shipment of materials to various project sites. Gerald McGreevy, also employed at the Dundee plant, was a Plant Operator responsible for the production of construction materials that were shipped to project sites and the printing of weight tickets that corresponded to those shipments.

The United States charges the defendants with various criminal activities that extended over a period of 23 years from 1973 to 1996, and the indictment alleges that the defendants executed fraudulent schemes throughout PBI and Monarch and engaged in various criminal activities in conjunction with their construction and repair projects. During that time, each defendant, in some capacity, controlled and/or participated in the execution and completion of those projects. To perform this work, PBI and Monarch hired unionized employees who were

represented by the International Brotherhood of Teamsters, the Construction and General Laborers District Council of Chicago and Vicinity, and the Fox Valley Laborers (collectively, "the Unions"). Both PBI and Monarch entered into collective bargaining agreements with each of the Unions to establish the terms and conditions of employment. The collective bargaining agreements generally provided for: (1) specific hourly wages; (2) "show-up" payments; (3) minimum guaranteed hours; (4) guaranteed lunch breaks; (5) overtime rates for working during lunch, and on Sundays or holidays; (6) employer statistical records; and (7) employer contributions to the Unions' health, welfare, and pension plans and employee benefit funds.

On October 3, 1996, a federal grand jury returned an indictment against PBI, Monarch, Peter, Joseph, and Sebastian Palumbo, Abdishi, Ferrarini, and McGreevy, alleging that the defendants were engaged in schemes to defraud their employees, the Unions, and various governmental entities by depriving them of money to which they were entitled under the terms and conditions of the collective bargaining agreements and under the provisions of the government contracts. The United States superseded the original indictment two times, first on November 21, 1996, before the defendants filed their motions to dismiss, and then again on July 23, 1997, after the defendants filed the motions. The allegations in the superseding indictments do not materially differ from those in the original, and the only significant change in the second superseding indictment is that the government increased the number of labor-related allegations

from twenty-nine to thirty-two counts. The second superseding indictment is the subject of this appeal. Racketeering Acts 1 and 2 in Count 1, Counts 8 through 30, and Counts 35 through 42 of the indictment are the subject of the defendants' collective motion to dismiss, and Count 1 in its entirety is the subject of Ferrarini's motion to dismiss.

In Count 1, the United States charges the defendants with a substantive RICO offense, in violation of 18 U.S.C. § 1962(c). The indictment identifies 23 predicate acts, including: (1) acts of mail and wire fraud, in violation of 18 U.S.C. §§ 1341 and 1343; and (2) payment of unlawful funds, in violation of Illinois law. Racketeering Acts 1 and 2 charge only PBI and its principal owners with predicate acts of mail fraud that advanced the defendants' scheme to defraud their employees and the Unions by depriving them of wages and benefit payments to which they were entitled under the collective bargaining agreements. The indictment alleges that the defendants engaged in practices of under-paying their employees and under-reporting the number of hours worked by them. To execute and conceal this fraudulent scheme, the government contends that the defendants used the United States Postal System to mail false payroll summaries, doctored time reports, falsified compliance documents, and reduced wages and benefit payments. The indictment alleges that the fraudulent mailings deprived the employees and the Unions of approximately $10 million, and, therefore, establish Racketeering Acts 1 and 2 in Count 1.

Racketeering Acts 3 through 22 charge various defendants with predicate acts of mail and wire fraud in connection with their scheme to defraud the state and local

municipalities. The indictment alleges that the defendants fraudulently billed various governmental entities approximately $15 million for construction materials that were not delivered and road work that was not performed and that the defendants used the postal system and wire transmissions to execute this fraudulent scheme. Racketeering Act 23 charges PBI and Abdishi with bribery and official misconduct in connection with Abdishi's supervision of the defendants' road construction projects, in violation of Illinois law.

Counts 8 through 30 of the indictment charge various defendants with individual acts of mail fraud, in violation of 18 U.S.C. § 1341. Some of the mail fraud violations are based on the same fraudulent scheme of PBI and its principal owners to deprive their employees and the Unions of wages and benefit payments and reallege substantially similar facts that implicate the same conduct, which includes the mailing of false payroll statements, doctored time reports, falsified compliance documents, and reduced wages and benefit payments. Each mailing is charged separately as an individual violation of the mail fraud statute, as opposed to their collective use in Count 1 as predicate acts to establish the defendants' pattern of racketeering activity. The remaining allegations in Counts 8 through 30 charge the defendants with mail fraud violations which are based on the defendants' scheme to defraud various governmental entities. Each mailing is charged as an individual violation of the mail fraud statute, and these remaining counts reallege substantially similar facts that illustrate the criminal conduct associated with the defendants' scheme to defraud the state and local municipalities.

Counts 35 through 42 of the indictment charge only PBI and its principal owners with making false statements in employment records which were maintained pursuant to ERISA reporting requirements, in violation of 18 U.S.C. § 1027. Specifically, the indictment alleges that the defendants recorded false information about the wages employees were paid and the hours they worked in PBI's employment records, which pertained to the Unions' health, welfare, and pension plans and employee benefit funds. The indictment also alleges that the defendants caused false statements to be reported and published in ERISA compliance documents.[1]

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[1] The following counts of the indictment are still pending: (1) count 32, which charges PBI, Sebastian Palumbo, Abdishi, Ferrarini, and McGreevy with causing PBI to report and submit false statements in Pay Estimates, in violation of 18 U.S.C. § 1020; (2) counts 31, 33, and 34, which charge PBI and its principal owners with causing PBI to file documents with the Department of Labor that falsely stated employees were paid wages according to the terms of the collective bargaining agreements, in violation of 18 U.S.C. § 1001; and (3) counts 43 and 44, which charge McGreevy with making material false declarations before the grand jury about his knowledge of and participation in the printing of false weight tickets that were used to fraudulently bill customers, in violation of 18 U.S.C. § 1623(a). The indictment also contains a forfeiture claim, which alleges that PBI, Monarch, and its principal owners have property subject to forfeiture pursuant to 18 U.S.C. §§ 1963(a)(1), (2), and (3).

Defendants' Motion to Dismiss the Labor-Related Counts of the Indictment

I. Background

On January 10, 1997, the defendants collectively filed a motion to dismiss portions of the indictment pursuant to Rule 12(b)(2) of the Federal Rules of Criminal Procedure. Rule 12(b)(2) provides that "[d]efenses and objections based on defects in the indictment" must be raised prior to trial. Fed.R.Crim.Pro. 12(b)(2). Specifically, PBI and its principal owners moved to dismiss Racketeering Acts 1 and 2 in Count 1; all defendants moved to dismiss Counts 8 through 30; and PBI and its principal owners moved to dismiss Counts 35 through 42 of the indictment.

In their brief in support of this motion, the defendants asserted, *inter alia*, that certain conduct described in portions of the indictment fails to charge criminal violations of RICO, mail fraud, and ERISA; instead the indictment, defendants argued, charges unfair labor practices and breaches of the collective bargaining agreements, in violation of the NLRA and LMRA. The defendants maintained that the dismissal of those portions of the indictment that implicate their breaches of the collective bargaining agreements is warranted because a criminal prosecution of unfair labor activities is inconsistent with labor policy. The defendants argued that the sufficiency of the indictment and the identification of the criminal conduct charged therein depend upon an interpretation of various terms and conditions of the collective bargaining agreements. Therefore, the defendants asserted that the federal labor statutes preempt the criminal prosecution, and the dismissal of Racketeering Acts 1 and 2 in

Count 1, Counts 8 through 30, and Counts 35 through 42 of the indictment is appropriate.

In response, the United States asserted that preemption pursuant to the NLRA or § 301 of the LMRA does not apply to this indictment. In its brief opposing the motion, the government recognized that labor law primarily governs disputes involving protected labor activities, unfair labor practices, and breaches of collective bargaining agreements. However, the government argued that neither unfair labor practices nor breaches of the collective bargaining agreements are charged in the indictment; instead, the government maintained that the indictment charges the defendants with criminal violations of RICO, mail fraud, and ERISA that incidentally occurred in the context of an employment relationship. Therefore, the United States asserted that neither the sufficiency of the indictment nor the prosecution of the defendants' alleged criminal conduct depends upon an interpretation of the terms and conditions of the collective bargaining agreements, and argued that the preemptive force of federal labor law does not apply to the criminal violations charged in the indictment.

On August 15, 1997, the district court granted the defendants' motion and dismissed Racketeering Acts 1 and 2 in Count 1, Counts 8 through 30, and Counts 35 through 42 of the indictment. *United States v. Palumbo Bros., Inc.*, No. 96 CR 613, Mem. Op. & Order (N.D. Ill. Aug. 15, 1997) (Bucklo, J.). Over the government's objections, the district court accepted the defendants' argument that § 301 of the LMRA preempts the labor-related portions of the indictment. The district court explained that the criminal allegations in the indictment derived

directly from obligations created in the collective bargaining agreements and determined that the defendants' conduct is unlawful only by virtue of their breaches of certain terms and conditions set forth in those labor contracts. In finding that the defendants' alleged criminal conduct also evidences unfair labor practices, the district court then concluded that § 301 of the LMRA preempts the criminal prosecution of the defendants' labor-related activities.

The United States filed a motion for reconsideration. The government argued that even if the defendants' alleged criminal activities qualify as breaches of the collective bargaining agreements, a criminal prosecution may never be preempted by federal labor law. The government also asserted that a civil cause of action is fundamentally different from a criminal prosecution, and one may not invalidate the other. The doctrine of labor preemption is inconsistent with well-settled criminal jurisprudence, the government argued, because the Attorney General retains the discretion and authority to investigate, indict, and prosecute any criminal violation of the law.

On October 9, 1997, the district court denied the United States' motion for reconsideration and, in a second opinion, clarified some aspects of its prior decision. *United States v. Palumbo Bros., Inc.*, No. 96 CR 613, 1997 WL 643618 (N.D. Ill. Oct. 9, 1997). The district court reemphasized that the defendants' unlawful activities are based solely on the terms and conditions of the collective bargaining agreements, and concluded that the sufficiency of the indictment cannot be determined without interpreting those agreements. The court reasoned that

existing law in the Seventh Circuit compels this conclusion and specifically concluded that allegations in an indictment cannot depend upon the interpretation of a collective bargaining agreement to state the essential elements of a crime. The district court reasserted its initial conclusion that § 301 of the LMRA preempts a criminal prosecution of labor-related activities and concluded that its dismissal of Racketeering Acts 1 and 2 in Count 1, Counts 8 through 30, and Counts 35 through 42 of the indictment was appropriate.

The United States filed a timely notice of appeal. On appeal, the government asserts that the district court erroneously granted the defendants' motion to dismiss, arguing that federal labor law can never preempt a criminal prosecution. The government asserts that the remedial schemes of the labor statutes do not authorize criminal penalties for either unfair labor practices or breaches of collective bargaining agreements, and furthermore, those labor laws are not designed to enforce any civil or criminal sanctions. The government argues that the labor sanctions ordered to remedy the defendants' unfair labor practices are not adequate substitutions for the criminal penalties available under RICO, the mail fraud statute, and ERISA imposed to punish the defendants' alleged criminal conduct.

We find that the United States' appeal is meritorious, and that the district court erroneously granted the defendants' motion to dismiss. With these facts as an introduction, we now turn to the issues presented for review.

II. Analysis

The issues presented in this portion of the United States' appeal are matters of first impression for the Seventh Circuit. At the heart of this dispute is the relationship between labor policy and criminal jurisprudence and the effect that combination of federal law has on the characterization of a criminal prosecution and the sufficiency of an indictment.[2] In this appeal, even though the alleged criminal conduct developed in the context of an employment relationship and intermingled with unfair labor practices, the United States asserts that the defendants' conduct goes beyond the scope of federal labor law and should be characterized as criminal, subject to prosecution. In response, the defendants argue that their activities are not criminal, but rather civil and within the scope of the labor statutes. Specifically, the defendants characterize their activities as breaches of the collective bargaining agreements, subject only to remedial labor sanctions. We examine the indictment and the substance of the allegations therein to ascertain the fundamental purpose underlying this criminal prosecution.

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[2] While the policies underlying federal labor law and the criminal code are independent of one another, certain conduct may fall within the framework of each body of law. For example, the deprivation of property or a contractual right in the context of labor law may constitute an unfair labor practice or a breach of a collective bargaining agreement within the scope of the NLRA or the LMRA, while simultaneously in the context of the criminal code, that conduct may also establish predicate acts in a pattern of racketeering activity in violation of RICO, a fraudulent use of the postal system in violation of the mail fraud statute, or the submission of false statements in violation of ERISA.

A. The Framework of an Indictment and The Characterization of this Dispute

To properly proceed with a prosecution, the government must allege conduct violative of a federal statute. *United States v. Sloan*, 939 F.2d 499, 501 (7th Cir. 1991). An indictment must include all of the essential elements of the crimes alleged therein, and each basis for conviction must be "clearly set out in the indictment." *United States v. Miller*, 471 U.S. 130, 136 (1985); *United States v. Susanne Yoon*, 128 F.3d 515, 521-22 (7th Cir. 1997). In reviewing the sufficiency of an indictment, a court should consider each "challenged count as a whole and should refrain from reading it in a hypertechnical manner." *United States v. McNeese*, 901 F.2d 585, 602 (7th Cir. 1990). The indictment must be "read to include facts which are necessarily implied" and "construed according to common sense." *United States v. Blinder*, 10 F.3d 1468, 1471 (9th Cir. 1993); *Yoon*, 128 F.3d at 521-22. This is a case of statutory interpretation which involves issues of law, and we review a district court's application of federal statutes and its dismissal of portions of an indictment *de novo*. *United States v. Powell*, 929 F.2d 1190, 1193 (7th Cir. 1991).

As a preliminary matter, we recognize that the district court examined the defendants' conduct principally as unfair labor practices in the context of a traditional labor dispute and only incidental to the criminal offenses charged in the indictment, and ultimately, the court concluded that the defendants' alleged criminal activities constituted unfair labor practices in violation of federal labor law. For purposes of this appeal, we agree with the

district court's conclusion that the alleged criminal conduct described in the indictment also illustrates the defendants' breaches of the collective bargaining agreements.[3] Nevertheless, we review the district court's analysis and independently consider the legal question at the heart of this appeal: whether an indictment that charges criminal offenses and simultaneously implicates unfair labor practices in those criminal allegations can survive labor preemption. However, before we examine the relationship between labor policy and criminal jurisprudence, let us first review the general statutory framework of the NLRA and LMRA.

B. Federal Labor Law & Policy: The National Labor Relations Act and Labor Management Relations Act

Congress created a specific legal framework to resolve legitimate labor disputes and to address particular concerns arising in the context of labor relations.[4] *See*

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[3] It is unnecessary for us to specifically determine that the defendants' activities are, in fact, unfair labor practices in violation of § 7 or § 8 of the NLRA. That analysis is not germane to the resolution of this dispute. If we determined that the defendants' conduct did not violate the employees' or the Unions' protected labor activities, then labor preemption would be a non-issue, and this appeal would be moot. Therefore, we assume for purposes of this appeal that the criminal allegations in the indictment also illustrate that the defendants' conduct qualifies as unfair labor practices.

[4] A legitimate labor dispute involves a conflict between labor and management over the terms and conditions of employment, which generally includes unfair labor practices

NLRA, 29 U.S.C. §§ 151 *et seq.* This framework reflects congressional intent to create a national, uniform body of labor law and policy, to protect the stability of the collective bargaining process, and to maintain peaceful industrial relations. *New York Tel. Co. v. New York State Dep't of Labor,* 440 U.S. 519, 528 (1979). The NLRA is a comprehensive code that regulates the unique labor-management relationship and recognizes the importance of protecting employees' rights to organize and to bargain collectively with their employers.[5] *Nash v. Florida Indus. Comm'n,* 389 U.S. 235, 238 (1967). The NLRA establishes protected labor activities for employees, and sanctions any unfair labor practices that interfere with those activities. 29 U.S.C. §§ 157, 158. If employees choose to organize, and subsequently elect a union representative, the NLRA also defines each party's bargaining rights and responsibilities and establishes the standards of conduct for employer, employee, and union alike. 29 U.S.C. § 159.

To resolve legitimate labor disputes, the NLRA created a centralized agency, the National Labor Relations Board ("NLRB"), to interpret and to administer the federal labor statutes and their uniform policies. 29 U.S.C. § 153. Pursuant to the doctrine of primary jurisdiction, only the NLRB has the jurisdiction and authority to review and remedy unfair labor practices, 29 U.S.C. § 160,

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and/or breaches of collective bargaining agreements. *See Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America v. Jewel Tea Co., Inc.,* 381 U.S. 676, 689-91 (1965).

[5] The National Labor Relations Act has been amended by the Labor Management Relations Act, 29 U.S.C. §§ 141-197 (1982), and the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531 (1982).

and as a general rule, the NLRB preempts both federal and state claims based on conduct that is "arguably prohibited" under the NLRA. *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 242-45 (1959); *see also Vaca v. Sipes*, 386 U.S. 171, 179-81 (1967).

1. NLRA: *Garmon* Preemption

In *Garmon*, the Supreme Court articulated a general rule in the context of a legitimate labor dispute to determine the parameters of the NLRB's jurisdiction and the NLRA's preemptive effect:

> When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of *state interference* with national policy is to be averted.

Id. at 245 (emphasis added). Based on the Supremacy Clause in the Constitution,[6] the *Garmon* doctrine primarily

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[6] The concept of preemption originates in the Supremacy Clause of the Constitution and focuses on the conflict between federal and state regulation. The Supremacy Clause declares, in relevant part, that federal law "shall be the supreme Law of the Land." U.S. Const. Art. VI, cl. 2. Both the Constitution and Congress have reserved exclusive power for the federal government in many enumerated areas, including labor relations. When federal and state laws conflict, the doctrine of preemption is applied, and it resolves the conflict in favor of the federal statute. *Rose v. Arkansas State Police*, 479 U.S. 1, 3 (1986). Also, when a state acts impermissibly in an area reserved exclusively for the federal government, the preemption doctrine invalidates that state action. *Id.*

focuses on the conflict between federal and state law and "the nature of the activities which the *States* have sought to regulate. . . . " *Id.* at 243 (emphasis added). A primary justification for preemption is "the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules" to the NLRB. *Vaca*, 386 U.S. at 180-81. Generally, *Garmon* preemption preserves the NLRB's jurisdiction and prevents state and local regulations from interfering with labor policy. *Talbot v. Robert Matthews Distrib. Co.*, 961 F.2d 654, 659 (7th Cir. 1992) (holding that *Garmon* "is designed to protect the primary jurisdiction of the NLRB . . . by providing the NLRB with exclusive jurisdiction to determine whether given conduct falls within the NLRA") (citations omitted). In *Garmon*, the Supreme Court specifically emphasized that its "concern is with delimiting areas of conduct which must be free from *state regulation* if *national policy* is to be left unhampered." 359 U.S. at 246 (emphasis added).

With this articulated focus on preventing state interference with federal labor policy, courts have indicated a hesitation to extend *Garmon* preemption to cases involving conflicts between the NLRA and other federal statutes. *See e.g., United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 948 F.2d 98, 105 (2d Cir. 1991) ("where federal laws and policies other than the NLRA are implicated, the *Garmon* rule is frequently considered inapplicable") (citing cases). The intersection of, or potential conflict between, *federal* statutes does not implicate the constitutional concerns underlying *Garmon* preemption. In addition, principles of statutory construction and interpretation, as well as the

underlying statutory policies and congressional intentions, also are important considerations when there is a potential conflict among federal statutes because fundamentally each federal statute has equal effect under the law. The Supreme Court provides that "[i]t is a cardinal principle of construction that. . . . [w]hen there are two acts upon the same subject, the rule is to give effect to both." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). Congressional intent behind one federal statute should not be thwarted by the application of another federal statute if it is possible to give effect to both laws. *Id.* Although *Garmon* preemption has been applied in a few circumstances when the NLRA conflicts with another federal statute,[7] other courts have indicated that *Garmon* preemption is not implicated by a conflict between the NLRA and other federal statutes. *See e.g., Smith v. Nat'l Steel & Shipbuilding Co.*, 125 F.3d 751, 754-57 (9th Cir. 1997) (holding that when the conflict is between federal statutes, *Garmon* preemption is inapplicable); *United States v. Boffa*, 688 F.2d 919, 931-33 (3d Cir. 1982) (finding that *Garmon* does not preempt a mail fraud prosecution).

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[7] In concluding that *Garmon* preemption does not apply in this case, we do not disturb prior decisions of this court, which have held that *Garmon* preempts a *civil* cause of action when the independent federal claim clearly involves a legitimate labor dispute. *See Talbot*, 961 F.2d at 662 (preempting *civil* RICO claim under the NLRA); *Underwood v. Venango River Corp.*, 995 F.2d 677, 685 (7th Cir. 1993) (preempting *civil* RICO claim under the Railway Labor Act). Those cases are significantly different from this case, and although the defendants attempt to reconcile them with the present indictment, *Underwood* and *Talbot* are not determinative in this prosecution.

We are reluctant to apply *Garmon* preemption in this case for several reasons. First, the indictment involves the intersection of federal statutes and does not implicate the constitutional concerns underlying *Garmon*. Second, this dispute involves both civil and criminal federal statutes, and the fundamental differences between a civil cause of action and a criminal prosecution also highlight other significant concerns that illustrate why we are hesitant to apply NLRA preemption. Preemption of portions of the indictment would leave the United States without recourse to punish criminal conduct which Congress specifically sought to prevent by the enactment of RICO, the mail fraud statute, and ERISA, and to sanction by the inclusion of criminal penalties and enforcement provisions in those statutes. The NLRA is designed to protect the collective bargaining process and to resolve legitimate labor disputes, and this indictment clearly does not challenge the bargaining process or implicate a labor dispute. Instead, the indictment specifically charges the defendants with criminal violations of RICO, mail fraud, and ERISA, and the prosecution of those criminal violations interferes with neither the NLRB's jurisdiction nor conflicts with labor policy. Criminal penalties are designed to punish public offenses and to prevent further public harm, not to enforce or vindicate private rights.

Finally, even if *Garmon* preemption does apply to the intersection of federal statutes, we are not convinced that this indictment presents an unresolvable conflict between the preemptive force of the NLRA and the criminal statutes charged that requires us to apply one body of law, labor or criminal, to the exclusion of the other. It is not clearly evident to us that the primary jurisdiction of the

NLRB is violated by the government's indictment and potential prosecution of the defendants' alleged criminal conduct. We also are not convinced that allowing the United States to proceed with its prosecution will "seriously jeopardize the delicate labor-management balance achieved under the federal labor laws." Appellee's Brief at 41.

In sum, we find little reason why *Garmon* should apply to preclude a criminal prosecution, particularly when each criminal statute explicitly proscribes the conduct alleged in the indictment. In the absence of any express congressional intent that unfair labor practices, which also independently qualify as violations of criminal statutes, are insulated from criminal liability, we find that the jurisdiction of a federal district court to adjudicate a criminal prosecution does not infringe upon or interfere with the primary jurisdiction of the NLRB. With these policies in mind, we decline to apply the doctrine of primary jurisdiction to the present indictment and conclude that the NLRA does not preempt portions of this indictment.

2. LMRA: § 301 Preemption

Just as federal and state courts are not equipped to displace the role of the NLRB in the administration of labor policy and the resolution of legitimate labor disputes, Congress was concerned that the NLRB is not equipped to provide sufficient remedies for breaches of collective bargaining agreements. In recognizing the balance achieved by a uniform body of federal labor law,

Congress articulated another facet of labor preemption, which provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). Section 301 of the LMRA creates a federal cause of action and grants district courts jurisdiction to adjudicate legitimate labor disputes involving breaches of collective bargaining agreements, so that the parties to those agreements have access to civil remedies for breach of contract. *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 455 (1957). In accordance with § 301, the Supreme Court recognized that when an unfair labor practice constitutes breach of a collective bargaining agreement, the NLRB's authority "is not exclusive." *Smith v. Evening News, Ass'n*, 371 U.S. 195, 197 (1962). Section 301 governs claims based directly on rights created by a collective bargaining agreement and claims substantially dependent on an analysis of those agreements. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987).

To adjudicate and resolve disputes involving breaches of collective bargaining agreements, § 301 of the LMRA "authorizes federal courts to fashion a body of federal law" to enforce those agreements. *Lincoln Mills*, 353 U.S. at 451. This body of federal law, consistent with

the NLRB's administration of labor policy, ensures uniform interpretation of such labor contracts and promotes peaceable resolution of legitimate labor disputes. *Id.* In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), the Supreme Court recognized:

> The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law. . . .

471 U.S. at 211. Accordingly, to maintain that "uniformity and predictability," the preemptive force of § 301 displaces any independent federal or state cause of action when the claim concerns a legitimate labor dispute and involves the breach of a collective bargaining agreement. *Id.*

Despite the breadth of § 301 preemption, not every cause of action that involves labor-related activities depends on an interpretation of a collective bargaining agreement for its resolution. *Id.* ("not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is preempted by § 301 or other provisions of the federal labor law"). Just as federal and state courts are not suited to displace the NLRB and to resolve legitimate labor disputes, the Supreme Court recognized that a LMRA lawsuit is not suited to displace the jurisdiction of federal courts and to

resolve claims that (1) involve the application of independent federal statutes or state statutes "rooted in local feeling and responsibility" and (2) concern only collateral issues of labor law. *Garmon*, 359 U.S. at 244. In *Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), the Supreme Court recognized that "federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies. . . . " 421 U.S. at 626. Accordingly, the uniform policies of labor law and the preemptive force of § 301 do not apply if the claim concerns labor issues that only are tangential to the resolution of the central dispute.[8] *Vaca*, 386 U.S. at 179-80.

Therefore, we recognize that § 301 of the LMRA does not automatically eliminate the viability of a criminal prosecution that implicates arguably unfair labor practices; those unlawful activities may only be collaterally related to labor issues, as compared to a direct association

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[8] Permitting federal courts to retain jurisdiction over independent federal causes of action when labor-related issues are merely collateral to the fundamental dispute is not so extraordinary. Under § 301 of the LMRA, Congress specifically granted district courts jurisdiction to resolve suits involving breaches of collective bargaining agreements. Congress recognized the ability of federal courts to appreciate the relevance and integrity of a uniform labor policy and granted the district courts the authority to apply those policies. Therefore, when a federal court adjudicates an independent federal or state cause of action with collateral labor issues, that court has the ability to recognize and to appreciate the significance of labor policy, and although the court ultimately applies an independent federal or state statute, that federal judge may still consider those labor policies and attempt to reconcile any inherent inconsistency.

with the criminal charges. It is against this background that we determine whether the United States sufficiently states in the indictment criminal conduct proscribed by RICO, the mail fraud statute, and ERISA without interfering with national labor policy and its uniform application and interpretation.

C. Reconciliation of Federal Labor Law & Policy with Criminal Jurisprudence

The preemptive effect of § 301 of the LMRA as applied to a criminal prosecution is not as clearly evident as the district court concluded, and the basic question engendered by this appeal is: to what extent did Congress intend that criminal statutes of general application apply to unfair labor practices, which are generally governed by the federal labor laws? Therefore, we first consider whether labor law and its uniform policies can be reconciled with RICO, the mail fraud statute, and ERISA to give simultaneous effect to each body of law without contradicting the general purposes or congressional intent underlying either labor law or the criminal code.

In *United States v. Turkette*, 452 U.S. 576 (1981), the Supreme Court articulated a rule of statutory construction:

> In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive."

452 U.S. at 580 (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). When the language of a statute is not clear, however, the Supreme Court concluded that courts should examine congressional intent and legislative history underlying the statute to determine whether there is "a clearly expressed legislative intention to the contrary." *GTE Sylvania, Inc.*, 447 U.S. at 108; *United States v. Doherty*, 969 F.2d 425, 429 (7th Cir. 1992). Absent a clearly expressed intention that Congress intended one federal statute to preempt another, courts must regard each as effective and give them simultaneous effect. *Morton v. Mancari*, 417 U.S. 535, 551 (1974). As articulated in our discussion of *Garmon* preemption, courts are hesitant to find that one federal statute preempts another. *Borden*, 308 U.S. at 198 ("repeals by implication are not favored"); *Red Rock v. Henry*, 106 U.S. 596, 601-02 (1883) (holding that two statutes must be read so as to coexist harmoniously unless congressional intent is "clear and manifest").

In the context of criminal cases, courts also have indicated a reluctance to interfere with the government's authority to initiate an investigation and its discretion to proceed with a prosecution.[9] *See United States v. Int'l*

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[9] The government retains broad discretion in determining whom to prosecute and what charges to file. *United States v. Sandoval-Curiel*, 50 F.3d 1389, 1394 (7th Cir. 1995). In *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985), Justice Marshall recognized:

> Prosecutors simply do not invoke the mail and wire fraud provisions in every case in which a violation of the relevant statute can be proved. For example, only where the scheme is directed at a "class of persons or

Union of Operating Engineers, Local 701, 638 F.2d 1161, 1162 (9th Cir. 1979) (concluding that courts should interpret statutes "with a presumption against a congressional intention to limit the power of the Attorney General to prosecute offenses under the criminal laws of the United States"). Courts recognize that criminal prosecution is " 'an executive function within the exclusive prerogative of the Attorney General.' " *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1366 (9th Cir. 1987) (citations omitted). The purpose of a criminal prosecution is not to provide a forum for the ascertainment of private rights; " '[r]ather it is to vindicate the public interest in the enforcement of the criminal law.' " *Standefer v. United States*, 447 U.S. 10, 25 (1980) (quoting *United States v. Standefer*, 610 F.2d 1076, 1093 (3d Cir. 1979)). Additionally, courts have recognized that Congress may limit or reassign prosecutorial authority and responsibility. *Case v.*

> the general public" and includes a "substantial pattern of conduct," will "serious consideration . . . be given to [mail and wire fraud] prosecution[s]." In all other cases, "the parties should be left to settle their differences. . . . "
>
> The responsible use of prosecutorial discretion is particularly important with respect to criminal RICO prosecutions – which often rely on mail and wire fraud as predicate acts – given the extremely severe penalties authorized by RICO's criminal provisions. Federal prosecutors are therefore instructed that "[u]tilization of the RICO statute, more so than most other criminal sanctions, requires particularly careful and reasoned application."

473 U.S. at 502-03 (Marshall, J., dissenting) (quoting U.S. Dept. of Justice, United States Attorney's Manual § 9-43.120 (Feb. 16, 1984); § 9-110.200 (Mar. 9, 1984) (citations omitted)).

Bowles, 327 U.S. 92, 96-97 (1946). If there were ever an exception to the general rule of prosecutorial discretion, the Supreme Court concluded: "[t]o graft such an exception upon the criminal law would require a clear and unambiguous expression of the legislative will." *United States v. Morgan*, 222 U.S. 274, 282 (1911).

In consideration of these principles of statutory construction and the government's ability to efficiently administer the criminal code and to prosecute any violation of criminal law, courts have recognized the inappropriateness of too narrow an interpretation of applicable statutes:

> To disregard the natural implications of the statute and to imprison our reading of it in the shell of mere words is to commit the cardinal sin in statutory construction, blind literalness.

In re Persico, 522 F.2d 41, 64 (8th Cir. 1975) (citing *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379, 392 (1953) (Frankfurter, J., concurring)). In *Morgan*, the Supreme Court held that a federal statute passed in the interest of public health did not hinder the government's discretionary power to initiate a criminal investigation or interfere with its control over the prosecution of conduct that was also regulated by that public health law. 222 U.S. at 281-82. Accordingly, seemingly conflicting statutes can be given simultaneous effect. *Morton*, 417 U.S. at 551 ("it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective"). Moreover, that a civil and criminal statute relate to the same subject matter or apply to similar conduct is not unprecedented. *United States v. Cappetto*, 502 F.2d 1351, 1357 (7th Cir. 1974) ("acts which may be prohibited by

Congress may be made the subject of both criminal and civil proceedings").

Given these canons of statutory construction and criminal jurisprudence, we recognize that the existence of a civil cause of action does not eliminate the availability or merit of an independent criminal prosecution that involves similar facts and implicates the same conduct, and we also observe that the availability of civil remedial orders imposed for violations of federal labor law does not eliminate the potential imposition of criminal penalties available for violations of criminal law. *Id.* at 1356-57. Wholly apart from any term or condition in a collective bargaining agreement, criminal law independently restricts and prohibits certain conduct by imposing penalties for the commission of a crime. The existence of labor grievance procedures to resolve unfair labor practices and the primary jurisdiction of the NLRB to impose remedial sanctions do not relieve an employer of accountability or insulate it from liability for participating in criminal violations of the law, even though resolution of the labor dispute and adjudication of the criminal prosecution may involve the same set of facts.

In its analysis, the district court determined that unfair labor practices, which are regulated by federal labor law, cannot serve as the basis for criminal charges, and therefore concluded that preemption pursuant to § 301 of the LMRA is appropriate because the terms and conditions of the collective bargaining agreements created the defendants' obligations at issue in this indictment. This narrow focus on the collective bargaining agreements is misplaced. The mere reference to the terms and conditions of collective bargaining agreements is

insufficient to justify § 301 preemption. *Loewen Group Int'l, Inc. v. Haberichter*, 65 F.3d 1417, 1423 (7th Cir. 1995). We disagree with the district court's conclusions and find that the indictment far exceeds the scope of federal labor law and policy even though the allegations may implicate labor-related activities. The district court's fundamental error is its characterization of the defendants' conduct; it defined the indictment in terms of a legitimate labor dispute and, as a result, incorrectly examined the defendants' conduct only in the context of labor law. This mischaracterization caused the district court to treat the indictment like a civil action instead of a criminal prosecution and led it to an erroneous conclusion.

We now turn to the specific allegations in the indictment as defined in terms of violations of *criminal law* and examine the defendants' conduct and the sufficiency of the indictment in the context of those criminal statutes.

1. Racketeer Influenced and Corrupt Organizations Act

Count 1 of the indictment charges the defendants with a substantive RICO offense and alleges 23 predicate acts to establish their pattern of racketeering activity. At issue in this portion of the appeal are Racketeering Acts 1 and 2 in Count 1, which specifically charge PBI and its principal owners with predicate acts of mail fraud. Congress passed RICO in an attempt to minimize systematic corruption, to curtail illegal profits generated through racketeering activities, and to prevent organized crime's further infiltration into legitimate business enterprises.

Russello v. United States, 464 U.S. 16, 26-29 (1983) (explaining that RICO was an aggressive initiative to supplement old remedies and to develop new methods for fighting crimes); *Turkette*, 452 U.S. at 580-93 (discussing generally legislative history, senate and congressional reports, and subcommittee hearings regarding the purpose and scope of RICO).

While RICO does not apply only to organized crime, it is by definition confined to patterns of criminal activity – i.e., it is unlawful for any person to use a pattern of racketeering activity to conduct or participate in the criminal affairs of an enterprise. 18 U.S.C. § 1961(1); *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 237 (1989). In *Turkette*, the Supreme Count recognized:

> [I]t was the declared purpose of Congress "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."

452 U.S. at 589 (quoting ORGANIZED CRIME CONTROL ACT OF 1970, Pub. L. 91-452 (1970) (84 Stat. 923)). Congress recognized a need to address the rapid infiltration of systematic corruption into legitimate businesses, and the statutory scheme includes severe criminal penalties, civil forfeiture provisions, and other civil remedies for both civil and criminal RICO violations. 18 U.S.C. §§ 1963 and 1964. In *Turkette*, the Supreme Court concluded that RICO's legislative history indicates that Congress was well aware it entered into a new domain of federal

involvement and enabled the federal government to address a large and seemingly neglected problem, whereby "existing law, state and federal, was not adequate to address the problem, which was of national dimensions." 452 U.S. at 586.

RICO expressly defines those activities which are prohibited:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or the collection of an unlawful debt.

18 U.S.C. § 1962(c). Thus, a violation of RICO occurs when a person is (1) employed by or associated with (2) an enterprise (3) engaged in or affecting interstate commerce, (4) where that person conducts or participates in a pattern of racketeering activity or the collection of an unlawful debt. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985); *McDonald v. Schencker*, 18 F.3d 491, 494 (7th Cir. 1994). The government must allege each of these elements in an indictment to charge a criminal RICO violation. 18 U.S.C. § 1962(c). Separate violations of other federal and state criminal statutes are the predicate acts upon which a pattern of racketeering activity is created. Those predicate acts involve conduct that is otherwise "chargeable" or "indictable" and violations that are "punishable" pursuant to independent criminal statutes, and RICO specifically identifies mail fraud as a predicate act for liability. 18 U.S.C. § 1961(1). A RICO offense involves

the relationship of those predicate acts in a pattern of criminal activity. Therefore, to establish a criminal violation of RICO, the government must first establish a defendant's predicate acts. In light of the present indictment, to ultimately resolve any conflict between federal labor law and RICO, we first must consider the relationship between labor law and the mail fraud statute.

Congress enacted the mail fraud statute to protect the integrity of the United States Postal System and to prevent it from being used as an "instrument of crime." *McNally v. United States*, 483 U.S. 350, 365 (1987) (Stevens, J., dissenting). The mail fraud statute imposes criminal penalties for any fraudulent use of the mail to deprive an individual of money or property. 18 U.S.C. § 1341. When the charge is mail fraud, this court uses a broad rather than a technical standard to determine the sufficiency of an indictment. *United States v. Brack*, 747 F.2d 1142, 1147 (7th Cir. 1984). Generally, a mail fraud violation includes two fundamental elements: (1) a scheme to defraud; and (2) the use of the mail in furtherance of that fraudulent scheme. *United States v. Biesiadecki*, 933 F.2d 539, 545 (7th Cir. 1991). This Circuit has recognized that mail fraud applies broadly to schemes that deprive individuals of money by making a false statement, or providing a half truth that is misleading, expecting that individual to act upon it to his detriment. *Emery v. Am. Gen. Fin., Inc.*, 71 F.3d 1343, 1346 (7th Cir. 1995). We also have determined that the omission or concealment of material information, even when a statute or regulation does not impose a duty to disclose, constitutes mail fraud. *Id.*

The district court, however, did not begin its analysis with the mail fraud allegations; rather, the court first

looked to the statutory language of RICO to determine if Congress intended to preempt a criminal prosecution of unfair labor practices. The district court recognized that the only labor-related activities specifically listed as predicate acts for liability under RICO are: (1) embezzlement from union funds, 29 U.S.C. § 501(c); (2) embezzlement from an ERISA fund, 18 U.S.C. § 664; (3) unlawful payments to welfare funds, 18 U.S.C. § 1954; and (4) unlawful payments to labor unions, 29 U.S.C. § 186. The district court emphasized the significance of congressional silence as to all other labor-related activities and suggested the silence indicated that Congress did not intend to have other labor activities serve as predicate acts in a RICO offense. *Palumbo Bros., Inc.*, Mem. Op. (Aug. 15, 1997) at 9. We disagree with the court's rationale. RICO is a statute of general application, and it is impossible for Congress to anticipate, identify, and define each and every context in which a violation of the listed statutes would qualify as a predicate act in a pattern of racketeering activity. "[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Haroco, Inc. v. Am. Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384, 398 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) (per curium).

To resolve the defendants' motion to dismiss, the district court ultimately relied on a line of Supreme Court cases and Seventh Circuit decisions interpreting civil RICO violations in conjunction with unfair labor practices and applied a test articulated by this court in *Underwood v. Venango River Corp.*, 995 F.2d 677 (7th Cir. 1993). to determine when Congress intended to preempt a claim

pursuant to § 301 of the LMRA. 995 F.2d at 684-85 (*overruled on other grounds by Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994)). In *Underwood*, we explained:

> The first step asks whether the claim seeks to vindicate a substantive right derived from some source other than the collective bargaining agreement. . . . If a claim survives the first inquiry, the second step asks whether adjudication of the claim requires interpretation of the CBA. When such interpretation is required, it impermissibly interferes with the federal scheme for labor dispute resolution.

Id. at 684. In applying *Underwood*, the district court determined that: (1) "defendants' alleged mail fraud is unlawful only by virtue of the obligations" in the collective bargaining agreements; and (2) resolution of the dispute requires an interpretation of those bargaining agreements. *Palumbo Bros., Inc.*, Mem. Op. (Aug. 15, 1997) at 11-12. Accordingly, the district court concluded that Racketeering Acts 1 and 2 are preempted "to the extent that . . . [they are] based on predicate acts of mail fraud in connection with a scheme to defraud defendants' employees and unions." *Id.* at 13.

The district court's interpretation of the indictment, however, is too narrow, and we are not persuaded by its reasoning that neither RICO nor the mail fraud statute are applicable to the defendants' conduct. The defendants' overall scheme alleged in Count 1 of the indictment is to defraud their employees and the Unions and to obtain money by false pretenses through use of the mail. There is nothing in the text of RICO to indicate that mail fraud is not a predicate act in a pattern of racketeering

activity when an employer uses the mail to execute a fraudulent scheme. The Seventh Circuit has not specifically considered the sufficiency of an indictment or the merits of a criminal prosecution for mail fraud in the context of an employment relationship. In fact, our research, in addition to the parties' research, identifies only one case that involves a substantially similar issue. In *United States v. Boffa*, 688 F.2d 919 (3d Cir. 1982), the Third Circuit considered the merits of NLRA preemption in relation to a criminal prosecution for mail fraud and concluded that labor law does not preempt a prosecution when the conduct in question also is independently proscribed by another federal statute. However, the district court declined to follow the Third Circuit's analysis, holding that *Boffa* is not persuasive authority and is distinguishable from the present indictment. *Palumbo Bros., Inc.*, Mem. Op. (Aug. 15, 1997) at 12. In fact, the district court suggested that we would have decided *Boffa* differently in light of this Circuit's prior decisions in *Underwood* and *Talbot*. *Palumbo Bros., Inc.*, 1997 WL 643618, at * 3-4.

In *Boffa*, the defendant devised and executed a fraudulent scheme to deprive his employees and a union of wages and benefit contributions, and the indictment charged the defendant with a criminal RICO offense and alleged predicate acts of mail fraud. 688 F.2d at 923. The Third Circuit reasoned that an employee's right to economic benefits, such as wages, is contractual and not statutory in nature, and therefore, the court determined that a fraudulent scheme to deprive individuals of monetary benefits through use of the mail falls directly within the scope of the mail fraud statute, even though those

economic benefits were obtained through collective bargaining. *Id.* at 930. The Third Circuit, therefore, concluded that the NLRA does not preclude "the enforcement of a federal statute that independently proscribes . . . conduct," even though that conduct, in the context of a legitimate labor dispute, is governed primarily by federal labor law. *Id.* at 931. In accordance with its determination that the NLRA does not preclude the enforcement of the mail fraud statute, the Third Circuit reasoned that the NLRA therefore does not preempt a RICO offense predicated on mail fraud. *Id.* at 933-34.

Notwithstanding our prior decisions, we are persuaded by the Third Circuit's analysis in *Boffa* and recognize that LMRA preemption is analogous to NLRA preemption. If we were to accept the district court's decision to preempt portions of the indictment, the general purpose of RICO would be frustrated, at least in part, when the resolution of a criminal violation involved reference to a collective bargaining agreement. The Supreme Court has recognized:

> The canon in favor of strict construction [of criminal statutes] is not an inexorable command to override common sense and evident statutory purpose. . . . Nor does it demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.

United States v. Brown, 333 U.S. 18, 25-26 (1948) (citation omitted). RICO provides that it is unlawful to conduct or to participate in a pattern of racketeering activity, and its

statutory provisions are written in general terms to identify conduct that is criminal without regard to the status or ultimate objective of the person(s) engaging in that conduct. 18 U.S.C. § 1962. Penalties imposed pursuant to RICO are supplemental sanctions for otherwise criminal activity.

The district court also suggested that the existence of grievance procedures to remedy unlawful labor activity demonstrates congressional intent to remove unfair labor practices from the reach of criminal prosecution. This conclusion also is erroneous. Federal labor laws do not purport to govern all unlawful conduct engaged in by employers, employees, and unions. One court previously recognized:

> [T]he alleged deprivation of [employee and] union rights are symptoms; the complaint in this case alleges a widespread disease. . . . The labor statutes are designed to treat these symptoms. RICO was enacted by Congress specifically to cure the disease.

Int'l Bhd. of Teamsters, 708 F. Supp. at 1394. In fact, neither the NLRA nor the LMRA provides criminal penalties for unfair labor practices or breaches of collective bargaining agreements. Rather, the Attorney General retains the discretion to investigate, indict, and prosecute, and federal courts have the jurisdiction to adjudicate a prosecution and to impose criminal penalties. In fact, the NLRB lacks the authority to enforce its remedial orders, and parties seeking the enforcement of those orders must seek relief

in the courts of appeals.[10] To the extent that labor law governs an employer's breach of a collective bargaining agreement in the context of a legitimate labor dispute, it is clear, however, that labor law does not provide the exclusive remedy for such a breach that advances a fraudulent scheme to deprive employees and unions of economic benefits to which they are entitled.

"[W]here Congress has provided remedies for proscribed conduct independent of those available in a NLRB proceeding, the preemption doctrine has no application." *Butchers' Union, Local No. 498, United Food and Commercial Workers v. SDC Inv., Inc.*, 631 F. Supp. 1001, 1007 (E.D. Cal. 1986) (citing *Vaca*, 386 U.S. at 179-80). Nothing in the language or legislative history of labor legislation suggests that penalties imposed for criminal violations should not be available to punish an employer who uses the mail to execute a fraudulent scheme and manipulates the bargaining process to insulate itself from criminal liability. The undisputed availability of criminal sanctions for a RICO violation demonstrates that the grievance procedures and remedial sanctions set forth in the NLRA and LMRA were not intended to be the exclusive means for regulating unfair labor practices that also

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[10] Congress omitted criminal sanctions and civil remedies from the NLRA. 29 U.S.C. § 160. The purpose of the NLRA is remedial and not punitive, and the NLRB only is able to impose cease and desist orders, reinstatement orders, and orders requiring payment of back pay to wrongfully terminated employees for unfair labor practices. 29 U.S.C. § 160(c). In addition, the NLRB cannot directly enforce its orders. Parties must seek relief in the federal courts of appeals to request compliance with the Board's orders. 29 U.S.C. § 160(e).

qualify as criminal offenses, particularly when Congress has explicitly provided criminal penalties for that proscribed conduct. Moreover, there is no basis for the district court's determination that the indictment constitutes an unwarranted extension into the scope of labor-related activities primarily governed by those labor statutes. There is minimal risk, if any, that prosecuting the defendants for alleged criminal conduct would impermissibly interfere with the NLRB's jurisdiction; a criminal prosecution fundamentally does not involve the regulation of labor activities.

The defendants cannot challenge the sufficiency of the indictment by defining their conduct as breaches of the collective bargaining agreements and argue that the allegations charged therein are not criminal violations, but rather labor law violations. If an employer were subject to alternative civil causes of action, in addition to the NLRA or LMRA, for unfair labor practices, then an employer would not have any motivation to participate in the collective bargaining process. As a result, Congress' attempt to create an independent statutory framework to govern labor law would be undermined. But, RICO is not designed to protect the private rights of employees or unions; rather, their avenue for relief lies within the scope of labor grievance procedures or a LMRA lawsuit. If an employee or union attempts to disguise a legitimate labor dispute as a RICO claim, we recognize the potential conflict and appreciate why courts have applied either the NLRA or § 301 of the LMRA to preempt that civil RICO claim. If this case involved a civil RICO claim brought by Palumbo employees or the Unions, then possibly the defendants

may have had a valid preemption argument. In the context of a legitimate labor dispute where either an employee or union files a civil RICO suit as opposed to following traditional grievance procedures, we recognize that an unresolvable conflict between labor law and civil RICO may emerge and preemption may be required. However, that is not an issue within the scope of this appeal, and we therefore decline to address the merits or success of that hypothetical scenario.

Upon closer inspection, the district court relied on cases involving causes of action alleging *civil* RICO violations while this dispute involves *criminal* RICO violations. The Supreme Court has indicated that "there are significant differences between civil and criminal RICO actions." *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984, 1990 (1997). Nonetheless, the court rejected the government's argument that it should not rely on the authority of cases involving civil RICO, noting that "RICO does not distinguish between plaintiffs." *Palumbo Bros., Inc.*, 1997 WL 643618, at * 5. The district court failed to recognize that there are fundamental differences between a private individual as a plaintiff and the government as a civil litigant in RICO claims that implicate supplemental concerns, notwithstanding the absence of an express articulation of those conflicts. The government seeks to vindicate public harm and to protect the public from systematic and pervasive criminal activities while the individual seeks to enforce private rights in a civil RICO cause of action. Therefore, a test used by courts to determine whether a civil RICO claim is preempted by labor law does not translate into a valid indicator that those labor statutes would also preempt the prosecution of a criminal RICO

offense.[11] As a result, we find that Underwood and Talbot are not necessarily determinative in this case.

Another significant difference is that civil RICO claims can be filed by either private individuals or the government, while criminal violations are prosecuted only by the United States. To remedy the breach of a collective bargaining agreement in the context of a legitimate labor dispute, civil litigants may file suit pursuant to § 301 of the LMRA for breach of contract, in lieu of other civil actions. This federal cause of action was created to maintain "interpretative uniformity and predictability" of collective bargaining agreements. *Allis-Chalmers*, 471 U.S. at 211. Persons or agencies who are not parties to the collective bargaining agreement cannot enforce the terms of that agreement. *Souter v. Int'l Union United Auto., Aerospace and Agr. Implement Workers of America, Local 72*, 993 F.2d 595, 597 (7th Cir. 1993). In other words, the government does not have standing to file suit pursuant to § 301, and the district court's conclusion that the "remedy for these alleged violations must be pursued under federal labor law" lacks effect. *Palumbo*

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[11] In *Sedima, S.P.R.L. v. Imrex Co., Inc.*, Justice Powell recognized:

> We ruled in . . . [other Supreme Court cases] that . . . [RICO] must be read broadly and construed liberally to effectuate its remedial purposes, but like the legislative history to which the Court alludes, it is clear we were referring there to RICO's *criminal* provisions. It does not necessarily follow that the same principles apply to RICO's private civil provisions.

473 U.S. at 529 (dissenting opinion) (citing cases).

Bros., Inc., Mem. Op. (Aug. 15, 1997) at 12. Without an ability to prosecute, the United States is deprived of its authority to seek punishment for criminal RICO violations; Congress surely did not intend that the government not have the ability to protect the general public from crime and to vindicate public harm for racketeering activities accomplished in the context of an employment relationship. Specifically, there is no clear expression of congressional intent to alter or to limit the broad scope of the government's prosecutorial discretion to seek indictments for violations of RICO in the general context of labor relations. *See, e.g., United States v. Sandoval-Curiel*, 50 F.3d 1389 (7th Cir. 1995).

When there is a *legitimate* labor dispute concerning a collective bargaining agreement, we recognize that preemption is an important tool to effectuate labor policies. If preemption were not available, a fundamental purpose underlying federal labor law and its uniform policies would be invalidated: parties to a collective bargaining agreement could sue directly in federal or state court for breach of contract pursuant to an independent cause of action without first seeking resolution of the labor dispute through the appropriate grievance procedures. However, that tool is not applicable to this indictment. In the present case, it is inconsequential that the United States incidentally implicates breaches of the collective bargaining agreements when it charges the defendants with alleged criminal offenses, because the purpose of the indictment is NOT to remedy a labor dispute, but to prosecute alleged criminal conduct. In addition, a criminal prosecution does not threaten or impair labor policy. Even though unfair labor practices may be implicated by

the alleged criminal activities, those unlawful labor activities are merely collateral to the alleged criminal activities which are the subject of the indictment and the focus of the government's prosecution.

In sum, we agree with the government's characterization of the function of the collective bargaining agreements: "[i]n the context of this prosecution, the collective bargaining agreement is merely an item of evidence." Appellant's Brief at 17. By this conclusion, we are not overruling Seventh Circuit precedent as articulated in *Underwood* and *Talbot* – those cases involved civil violations of RICO and are distinguishable from this criminal prosecution. Rather, we are asserting a fundamental principle of criminal law: an indictment and criminal prosecution for a RICO offense cannot be preempted by federal labor law, notwithstanding a reference to or the interpretation of a collective bargaining agreement. We find that the United States sufficiently alleges in the indictment the defendants' predicate acts of mail fraud to substantiate the allegations in Racketeering Acts 1 and 2. Accordingly, we conclude that the district court erroneously dismissed Racketeering Acts 1 and 2 in Count 1 of the indictment.

2. Mail Fraud

Next, we consider the district court's decision to dismiss Counts 8 through 30 of the indictment, which charge the defendants with substantive violations of the mail fraud statute. Some of the conduct described in these counts of the indictment to support portions of the mail fraud allegations specifically reallege facts discussed

above in Racketeering Acts 1 and 2 in Count 1, and portions of the conduct described in Racketeering Acts 3 through 22 support the remaining substantive mail fraud charges in association with the defendants' scheme to defraud various governmental entities by fraudulently billing those entities for work not completed and materials not used.

Without any discussion, the district court concluded: "Counts 8-30, alleging mail fraud based on the same labor scheme, also are preempted." *Palumbo Bros., Inc.*, Mem. Op. (Aug. 15, 1997) at 13. The court reasoned that because Racketeering Acts 1 and 2 in Count 1 are preempted then Counts 8 through 30 automatically are preempted. This conclusion, however, is erroneous, and we disagree with the district court's decision to dismiss Counts 8 through 30. As discussed above, we are persuaded by *Boffa* and agree with the Third Circuit's analysis. Thus, we conclude that the defendants' scheme to defraud their employees and the Unions of monetary benefits falls directly within the scope of the mail fraud statute, even though those economic benefits were obtained through collective bargaining. 688 F.2d at 930. The analysis of the defendants' acts of mail fraud in Racketeering Acts 1 and 2 in Count 1 as predicate acts in a pattern of racketeering activity translates into a substantially similar analysis of the defendants' acts of mail fraud charged in Counts 8 through 30 as substantive individual violations of the mail fraud statute.

In this case, the employees and the Unions' rights to wages and benefit payments also are contractual in nature and not statutory, even though those monetary

benefits are defined in the collective bargaining agreements. Congressional intentions underlying the mail fraud statute are to prevent use of the postal system to further such fraudulent schemes, regardless of the origin of the schemes. Accordingly, we find that the broad language of the mail fraud statute proscribes schemes that deprive individuals of their economic benefits, even though their right to those benefits also may be defined in a collective bargaining agreement. We conclude, in accordance with our previous analysis of Count 1, that the substantive violations of the mail fraud statute relating to the defendants' scheme to defraud their employees and the Unions are not preempted by federal labor law.

The acts of mail fraud in which the defendants fraudulently billed various governmental entities, however, were not addressed in our previous discussion of Racketeering Acts 1 and 2 of Count 1. The district court concluded that Counts 8 through 30 are preempted because they are "based on the same labor fraud scheme." *Palumbo Bros., Inc.*, Mem. Op. (Aug. 15, 1997) at 13. This conclusion, however, is inconsistent with the allegations in the indictment, and we disagree with the district court's conclusion. The remaining substantive violations of mail fraud are based upon the defendants' scheme to defraud various governmental entities by fraudulently billing them for work not performed and materials not used in their construction and repair projects; that scheme is independent of and separate from the defendants' scheme to defraud their employees and the Unions. Although these fraudulent schemes generally include the same participants, encompass similar conduct, and accomplish a common goal, each scheme is

independent of the other and requires separate consideration and review. Most important, the defendants' obligations to its employees and the Unions derive from the terms and conditions of the collective bargaining agreements, and those requirements are separate from and substantially different than the defendants' obligations to the state and local municipalities, which derive from provisions of the defendants' government contracts.

The district court relied upon the alleged significance of the collective bargaining agreements to dismiss Counts 8 through 30 of the indictment; however, that reasoning does not support the court's conclusion that those allegations charging the substantive violations of the mail fraud statute in connection with the defendants' scheme to defraud various governmental entities, which derive from provisions of their government contracts, also are preempted by labor law. In comparing different fraudulent schemes based on separate contracts, the district court compared apples to oranges and ultimately concluded, without support, that they are substantially the same. Accordingly, we find that the district court erroneously dismissed the substantive violations of mail fraud that derive from the defendants' separate scheme to defraud the governmental entities. In sum, we conclude that the allegations of mail fraud in Counts 8 through 30 of the indictment, which derive from *both* of the defendants' fraudulent schemes, also survive labor preemption.

3. Employee Retirement Income Security Act

Finally, we consider the district court's decision to dismiss Counts 35 through 42 of the indictment, which charge PBI and its principal owners with under-reporting the number of hours worked by the Palumbo employees and submitting false statements in violation of ERISA reporting requirements, 18 U.S.C. § 1027. Specifically, the United States charges that the defendants made false statements in compliance documents and caused false statements to be submitted in reports filed by the Palumbo construction firms.

Congress enacted ERISA to govern the development of employee health, welfare, and pension plans and to regulate the maintenance of those plans. 29 U.S.C. § 1001(a) and (c); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983); *Anweiler v. Am. Elec. Power Serv. Corp.*, 3 F.3d 986, 989 (7th Cir. 1993). ERISA is a comprehensive statute designed to protect the interests of employees and their beneficiaries in those benefit plans, by establishing standards of conduct and obligations for the fiduciaries of those benefit plans and by imposing appropriate sanctions for any violation. 29 U.S.C. § 1001. Jurisdiction of the federal district courts is explicitly established in ERISA, and Congress specifically included employers and unions within the scope of that jurisdiction. 29 U.S.C. § 1001(b). ERISA independently requires that employers who agree to contribute benefit payments to any employee welfare plan or benefit fund absolutely comply with that obligation, and that obligation is separate from

any duty to contribute pursuant to the terms and conditions of a collective bargaining agreement. 29 U.S.C. § 1021.

To protect the interests of the participants in employee benefit plans, ERISA requires that employers and plan administrators disclose to the participants and their beneficiaries certain financial and other information that describe and summarize the benefit plan. 29 U.S.C. § 1021. The statute specifically defines the information that must be included in those descriptions and summaries. 29 U.S.C. § 1022. Additionally, employers and administrators are required to file annual reports with the Secretary of Labor describing the benefit plans, providing specific information, such as the hours worked by their employees and the wages each employee earned, and identifying any modifications or changes to those plans. 29 U.S.C. §§ 1023 and 1024. ERISA also requires that those reports are published and available to the participants and their beneficiaries of those plans. 29 U.S.C. § 1024. Finally, ERISA requires that any administrator or employer who is subject to the reporting and filing requirements must maintain records that document all of the information and data that is reported and/or filed so that the information can be verified and checked for its truthfulness, accuracy, and completeness. 29 U.S.C. § 1027.

Congress also included criminal penalties for violations of these reporting requirements:

> Whoever, in any document required by . . . [ERISA] to be published, or kept as part of the records of any employee welfare benefit plan or employee pension benefit plan,

> . . . makes any false statement or representation of fact, knowing it to be false, or knowingly conceals, covers up, or fails to disclose any fact the disclosure of which is required by such title or is necessary to verify, explain, clarify, or check for accuracy and completeness any report required by such title to be published or any information required by such title to be certified, shall be fined under this title, or imprisoned not more than five years, or both.

18 U.S.C. § 1027. To establish a violation of the ERISA reporting requirements, the government must demonstrate that (1) a defendant made a false statement or representation of fact (2) with the knowledge that the false statement or concealment was made in a document required to be published, and (3) the plan in question was an employee welfare benefit or pension plan within the meaning of and subject to the Act. *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 573 (1985). As such, employers, plan administrators, and other individuals are subject to criminal penalties for knowingly making false statements or concealing facts in any document or report that is filed or published pursuant to ERISA reporting requirements. *Id.*; 18 U.S.C. § 1027.

The district court employed similar reasoning in its analysis of the alleged ERISA reporting violations as used in its analysis of RICO and the mail fraud statute, and determined that the "truth or falsity of the defendants' statements . . . cannot be determined without reference to the underlying [collective bargaining agreements] . . . which created the ERISA obligations." *Palumbo Bros., Inc.*, Mem. Op. (Aug. 15, 1997) at 14. In its analysis of the

indictment, the district court determined that the defendants' obligations to make contributions, maintain compliance information, and prepare reports derive from the terms and conditions of the collective bargaining agreements and, therefore, "owe their 'existence solely to the terms' " of those agreements. *Id.* at 14 (quoting *Trans World Airlines, Inc. v. Sinicropi*, 887 F. Supp. 595, 606 (S.D.N.Y. 1995), *aff'd*, 84 F.3d 116 (2d Cir. 1996)).

We disagree with this conclusion and again find the district court's analysis and the defendants' arguments unpersuasive. As we discussed above, the district court mischaracterized the fundamental purpose of the government's prosecution and improperly examined the defendants' conduct in the context of a legitimate labor dispute, instead of recognizing the alleged criminality of their conduct, which includes the defendants' violations of ERISA reporting requirements that facilitated their ability to conceal the fraudulent schemes and to maintain their criminal operations. "There can be no doubt that ERISA provides a remedial scheme independent of the NLRA," and to the extent that collateral issues of labor law emerge in the context of an ERISA violation, federal courts have the authority to resolve those issues. *Carpenters Local Union No. 1846 of the United Bhd. of Carpenters and Joiners of Am. v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 519 (5th Cir. 1982). The district court also failed to recognize that the United States does not seek a private remedy for Palumbo employees or the Unions; rather, the government seeks criminal penalties pursuant to 18 U.S.C. § 1027 for the defendants' submission of false statements in ERISA compliance documents. Any unlawful labor activity arising from conduct described in the

indictment is merely collateral to the prosecution, and any private remedy available to the employees or the Unions is completely separate and distinct from any criminal penalty imposed for the defendants' alleged criminal conduct.

Although the defendants' obligations to contribute are defined in provisions of the labor contracts, the falsity of their statements can be determined, nonetheless, without making the collective bargaining agreements the subject of the dispute. As the Third Circuit suggested in *Boffa*, certain contractual rights of employees to economic benefits lie squarely within the scope of a criminal prosecution for any fraudulent breach, notwithstanding traditional labor relations. The statute explicitly provides that an employer who knowingly submits false statements in an ERISA document is subject to criminal prosecution, and we conclude that Congress did not intend to insulate employers from prosecution for criminal violations of ERISA based on the mere coincidence that the employer's obligation to contribute to those benefit plans resulted from collective bargaining. Therefore, we conclude that extending labor preemption into the realm of criminal prosecution is unwarranted, and that the district court erroneously granted the dismissal of Counts 35 through 42 of the indictment.

On the face of the indictment, it is clear that the government does not seek to remedy unlawful labor activities or to enforce the private rights of the Palumbo employees or the Unions; instead, the indictment charges the defendants with, *inter alia*, criminal violations of RICO, mail fraud, and ERISA, which are not protected labor activities. The unfair labor practices implicated in

the indictment cannot be defined solely in relation to federal labor law and policy; rather, that conduct also must be defined and analyzed in the context of the criminal offenses charged in the indictment. If we were to affirm the district court's decision to dismiss portions of the indictment, we would shield future employers from similar prosecution. Clearly, labor law does not grant an employer the ability to negotiate a collective bargaining agreement, subsequently devise a scheme to defraud its employees and the union, and then because that employer had the foresight to sign a bargaining agreement, ultimately insulate itself from criminal liability.

Even though there is an arguable connection between the defendants' alleged criminal conduct and their unfair labor practices, those labor-related issues are collateral to the fundamental purpose and general scope of a criminal prosecution, and the heart of this indictment is the defendants' alleged criminal conduct which is properly charged as violations of RICO, the mail fraud statute, and ERISA. The district court misapplied labor preemption and failed to realize that it can give simultaneous effect to the labor statutes and the criminal code without frustrating labor policy and without limiting the scope of the applicable criminal statutes. *Morton*, 417 U.S. at 551 ("the courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective"). Accommodation of federal labor policy does not require automatic preemption of a criminal prosecution; it does require that, in the context of a *legitimate* labor dispute, the remedy for such unfair

practices must be sought through the traditional avenues of labor grievance procedures.

In the instant case, we find that the United States' decision to indict the defendants for alleged criminal violations of RICO, mail fraud, and ERISA is independent of and distinct from a legitimate labor dispute. The United States' indictment and prosecution of the Palumbo enterprise do not interfere with the primary jurisdiction of the NLRB or impair the underlying purpose and application of federal labor law and policy. Although the terms and conditions of the collective bargaining agreements may be referenced in this prosecution, those labor contracts are not the subject of the dispute, and the adjudication and ultimate resolution of the prosecution will NOT substantially depend upon an analysis of those terms and conditions. Neither the district court's analysis nor the defendants' arguments persuade us that the criminal charges alleged in the indictment significantly offend or hinder labor policies to justify the dismissal of the labor-related portions of the indictment. Accordingly, we conclude that the indictment is valid and that neither the NLRA nor the LMRA has any preemptive effect on this criminal prosecution.

Ferrarini's Motion to Dismiss Count 1

I. Background

In Count 1 of the indictment, the United States charges Ferrarini with a substantive RICO offense, in violation of 18 U.S.C. § 1962(c). The indictment identifies a total of 23 predicate acts in a pattern of racketeering activity, but only names Ferrarini in two racketeering

acts. Racketeering Acts 21i and 22f specifically charge Ferrarini with predicate acts of mail fraud in connection with the defendants' scheme to defraud various governmental entities. On January 10, 1997, Ferrarini filed a motion to dismiss Count 1 of the indictment in its entirety.

In his brief to support the motion, Ferrarini argued that he did not participate in a pattern of racketeering activity or conduct the affairs of a RICO enterprise. He also challenged the sufficiency of the indictment, arguing that the government fails to allege the required elements of a RICO offense. Specifically, Ferrarini asserted that continuity of the predicate acts is a required element of a RICO offense, and the government fails to demonstrate the continuity of his predicate acts in the indictment. In response, the United States argued that the indictment establishes sufficient continuity of Ferrarini's predicate acts to constitute a pattern of racketeering activity because a threat of continuity exists where the predicate acts are part of a routine or the regular way of conducting business.

On August 20, 1997, the district court granted Ferrarini's motion to dismiss Count 1 in its entirety. The court rejected his first argument, but accepted the second. First, the district court determined that if the allegations in the indictment are proven at trial and the defendants are convicted for racketeering activities, then Ferrarini would be deemed to have participated in the affairs of a RICO enterprise. Nonetheless, the district court dismissed Ferrarini from Count 1, holding that the indictment fails to state the required elements of a RICO

offense and does not establish the continuity of his predicate acts. The court determined that Ferrarini's predicate acts are only part of a single scheme of fraudulent activity, not a pattern of racketeering activity, and the indictment does not establish sufficient continuity in Ferrarini's conduct. *United States v. Palumbo Bros., Inc.*, No. 96 CR 613, Mem. Op. & Order (N.D. Ill. Aug. 20, 1997) (Bucklo, J.).

Thereafter, the United States filed a motion for reconsideration, asserting that it is not necessary to allege continuity with particularity on the face of the indictment. The government argued that demonstrating a pattern of racketeering activity is an essential element of RICO, and that continuity of the defendant's predicate acts is merely a sub-part of the pattern and not an essential element of the crime. The government therefore maintained that the allegations in Count 1, as stated in the indictment, were sufficient to survive Ferrarini's motion to dismiss. In a ruling from the bench on October 10, 1997, the district court refused to reconsider its decision, holding that an indictment has to state a clear basis on which there could be a conviction and concluded that the allegations in Count 1 fail to sufficiently state the elements necessary to charge Ferrarini with a criminal violation of RICO.

The United States filed another timely notice of appeal. On appeal, the government challenges the district court's dismissal of Ferrarini from Count 1, asserting that the indictment in fact includes sufficient allegations and states the requisite elements to charge Ferrarini with a substantive RICO violation. The government argues that: (1) it does not have to allege the continuity of Ferrarini's

predicate acts in a pattern of racketeering activity with particularity for the indictment to adequately state a violation of RICO; and (2) the allegations in Count 1 of the indictment sufficiently state a clear basis on which Ferrarini could be convicted of a RICO offense.

For the reasons discussed below, we find that the United States' appeal is meritorious, and that the district court erroneously granted Ferrarini's motion to dismiss Count 1. With these facts as background, we now turn to the issues presented for review.

II. Analysis

In our review of this motion, we examine the allegations charged in Count 1, specifically Ferrarini's predicate acts, to determine whether the United States alleges the essential elements of RICO to adequately charge Ferrarini with a criminal violation. The fundamental questions before us are: (1) whether the continuity of a defendant's predicate acts is an essential element of a RICO offense that must be explicitly stated in the indictment; and (2) if it is, whether the government's indictment sufficiently alleges the continuity of Ferrarini's predicate acts in a pattern of racketeering activity to charge him with a criminal RICO offense.

As discussed in the analysis above, an indictment must include all of the essential elements of a crime to sufficiently charge a criminal violation of the statute proscribing that conduct. *Yoon*, 128 F.3d at 521-22; *Blinder*, 10 F.3d at 1471. A violation of RICO occurs when a person is (1) employed by or associated with (2) an enterprise (3) engaged in or affecting interstate commerce, (4) where

the person conducts or participates in a pattern of racketeering activity. 18 U.S.C. § 1962(c). To sufficiently allege a pattern of racketeering activity, the statute requires "at least two acts of racketeering activity" within ten years. 18 U.S.C. § 1961(5). However, something beyond the mere number of acts also is required; the indictment must contain sufficient facts to demonstrate that the racketeering acts are related and that those acts establish or threaten continuing criminal activity. *H.J., Inc.*, 492 U.S. at 239 (requiring "continuity plus relationship" in a defendant's predicate acts).

On appeal, the United States first argues that: (1) continuity is not an essential element of a RICO offense; and (2) an indictment does not have to explicitly delineate the continuity of a defendant's predicate acts to withstand a motion to dismiss. We agree that an indictment does not have to allege continuity with particularity to survive a motion to dismiss. "[C]ontinuity is not an element of a RICO offense, *stricto senso*, but it is nevertheless a necessary characteristic of the evidence used to prove the existence of a pattern." *United States v. Boylan*, 898 F.2d 230, 250 (1st Cir. 1990). Continuity of the predicate acts is one element in a pattern of racketeering activity, but it only *partially* evidences a pattern of conduct. It is the combination of continuity along with the relatedness of the predicate acts that demonstrates the pattern of racketeering activity. Allegations in an indictment do not require conclusive proof of every aspect of the crime to sufficiently allege a violation; rather, an indictment requires only the *essential* elements. *United States v. Webster*, 125 F.3d 1024, 1029 (7th Cir. 1997). Although continuity is an element of proof necessary *at*

trial to conclusively establish Ferrarini's pattern of racketeering activity, as the First Circuit concluded in *Boylan*, we agree that it is not an essential element of a RICO offense that must be clearly and specifically established in the indictment.

The United States' second argument asserts that the indictment sufficiently demonstrates the continuity of Ferrarini's predicate acts in a pattern of racketeering activity. In reviewing the sufficiency of an indictment, the Supreme Court has explicitly acknowledged that factual allegations may be considered to establish the continuity of a defendant's predicate acts in a pattern of criminal conduct. *H.J., Inc.*, 492 U.S. at 242-43. Even though explicit allegations of continuity are not required to initially charge a criminal violation of RICO, an indictment must include supplemental facts that reasonably substantiate the existence of continuity, and a district court may consider those external factual allegations in the indictment that identify and describe the elements of the crime to determine the existence of continuity in a defendant's predicate acts. *United States v. Turino*, 978 F.2d 315, 318 (7th Cir. 1992).

In reading the indictment as a whole, we find that, even though Ferrarini is named in only two racketeering acts, the indictment includes sufficient facts that reasonably substantiate the existence of a routine and, therefore, the existence of continuity. Mail fraud is more than just a mailing; it requires knowing participation in a fraudulent scheme. *United States v. Morris*, 80 F.3d 1151, 1160 (7th Cir. 1996). The checks that were mailed in each instance resulted from fraudulent conduct whereby Ferrarini repeatedly participated in the creation of false weight

tickets over an extended period of time, and those inflated tickets were delivered to the work sites relating to the government projects, as defined by provisions of the defendants' contracts with various governmental entities. We conclude that the indictment reasonably demonstrates sufficient continuity of Ferrarini's predicate acts and that the district court erroneously granted Ferrarini's motion to dismiss Count 1 of the indictment in its entirety.[12]

Conclusion

We find that the district court erroneously granted the defendants' collective motion to dismiss Racketeering Acts 1 and 2 in Count 1, Counts 8 through 30, and Counts 35 through 42 of the indictment and Ferrarini's individual motion to dismiss Count 1 in its entirety. Accordingly, we Reverse the district court's orders dismissing portions of the indictment and Remand for further proceedings consistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[12] In reversing the district court's dismissal of Count 1, we are not concluding that Ferrarini actually engaged in a pattern of racketeering activity, nor that he even committed any predicate acts of mail fraud. We are merely holding that, at this stage in the proceedings and with the present record, the United States alleged sufficient facts in the indictment to survive Ferrarini's motion to dismiss.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Case No.
PALUMBO BROS., INC., MONARCH ASPHALT CO., PETER PALUMBO, JOSEPH PALUMBO, SEBASTIAN PALUMBO, KELSON ABDISHI, DANIEL FERRARINI, and **GERALD McGREEVEY,**	)	96 C 613
Defendants.	)	

MEMORANDUM OPINION AND ORDER

The government filed a forty-four count second superseding indictment (the "indictment") against defendants Palumbo Brothers, Inc. ("PBI"), Monarch Asphalt Co. ("Monarch"), Peter Palumbo, Sebastian Palumbo, and Joseph Palumbo (collectively "the defendants") alleging a course of fraudulent conduct involving, *inter alia,* mail and wire fraud, 18 U.S.C. §§ 1341, 1343, false statements in connection with the Employee Retirement Income Security Act ("ERISA"), 18 U.S.C. § 1027, and violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* The defendants have moved to dismiss parts of Count 1, Counts 8-30, and Counts 35-42 on grounds of preemption. They argue that these counts allege violations of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.* and/or Section 301 of the Labor Management Relations Act

("LMRA"), 29 U.S.C. § 185, and that these laws preempt criminal prosecution for any such violations. The government argues that the conduct detailed in the indictment does not amount to unfair labor practices and that the defendants' actions are proscribed by laws other than the labor laws. For the reasons set forth below, the defendants' motion is granted.

Background

The defendants are engaged in the business of constructing and repairing roads. The corporate defendants, PBI and Monarch, are businesses which are owned by members of the Palumbo family including the individual defendants, Sebastian Palumbo, Peter Palumbo, and Joseph Palumbo. During the relevant time period, PBI and Monarch provided road construction and repair services for many of the roads, highways, and interstates in Chicago and its surrounding suburbs.

To do this work, PBI and Monarch employed many unionized workers. These workers were represented by several unions including the International Brotherhood of Teamsters ("Teamsters"), the Construction and General Laborers District Council of Chicago and Vicinity ("Laborers District Council"), and the Fox Valley Laborers. PBI, Monarch, and these unions entered into collective bargaining agreements ("CBAs") that governed the terms and conditions of employment for union members. For example, these agreements required the defendants to pay their employees a double time rate for any work performed on Sundays.

The government's indictment alleges that the defendants engaged in a pattern of racketeering activity spanning approximately a twenty-three year period from 1973-96. Count 1 of the indictment, the RICO count, alleges numerous predicate acts of mail fraud by the defendants. The government has classified some of these predicate acts as laborers' and teamsters' fraud. The government contends that the defendants executed a scheme to defraud their employees and labor unions. The scheme allegedly consisted of under-reporting the number of hours worked by employees, thereby reducing the defendants' contributions to the pension and health and welfare fund "in violation of the agreements . . . with the Laborers Union and Teamsters Union." Indictment ¶¶ 12-13. The government also claims that, as part of this scheme, the defendants engaged in several practices to avoid paying their employees the required wages pursuant to the terms of their CBAs with the Laborers Union and Teamsters Union. *Id.* ¶¶ 14-21. To conceal the scheme, the government contends that the defendants sent many false statements and compliance documents through the mail to the Teamsters Union, Laborers Union, and the Illinois Department of Transportation (IDOT) which under-reported the number of hours worked by employees of PBI on certain road projects. *Id.* ¶¶ 24-27.

Counts 8-30 of the indictment allege acts of mail fraud connected with the above described labor fraud scheme. These acts are charged as separate violations of the mail fraud statute, 18 U.S.C. § 1341, as opposed to their use in Count 1 as predicate acts to establish a pattern of racketeering activity in violation of RICO. These counts reallege almost all of the factual information

and conduct contained in Count 1. Similarly, Counts 35-42 are based on the alleged submission of false statements by the defendants in connection with required ERISA filings. *See* 18 U.S.C. § 1027. The defendants argue that these counts, like Count 1, are preempted because they are intertwined with issues involving breach of the CBAs and unfair labor practices. The government claims that proof of the defendants' crimes will involve neither an analysis of the CBAs nor a determination about unfair labor practices.

Federal Labor Laws and Preemption

Congress created a special legal framework to govern the relationship between labor and management. Congress enacted the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.*, which set the rights and obligations of unions and management in the collective bargaining process. To administer this law, Congress established the National Labor Relations Board ("NLRB") and gave it primary jurisdiction over many disputes involving labor and management. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 242-43 (1959). In order "to remedy conduct that is arguably protected or prohibited" by sections 7 or 8 of the NLRA, the Act "pre-empts state and federal court jurisdiction" in favor of the NLRB. *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274, 276 (1971).

Congress also enacted Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. Preemption under Section 301 is "related to but distinct from" NLRA preemption. *Allis-Chalmers Corp. v. Lueck*,

471 U.S. 202, 212 n.6 (1985). Unlike the NLRA, Section 301 does allow for federal court jurisdiction but only for disputes involving breaches of CBAs. 29 U.S.C. § 185(a). Section 301, however, preempts claims that are "founded directly on rights created by collective-bargaining agreements . . . [or] 'substantially dependent on analysis of a collective-bargaining agreement.' " *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987) (citations omitted).

Over the course of seven pages, the indictment describes numerous acts of the defendants by which they sought to reduce the amount of wages they paid to their unionized employees. According to the government, the defendants failed to pay their unionized employees at the double time rate on Sundays and for any amount of hours worked over ten and one-half hours Monday through Friday and eight hours on Saturday. Indictment ¶¶ 18, 20-21. They also did not pay their workers one-half hour's wages for working during their scheduled lunch times and at least four hours' wages for any employees who started work on Saturdays, Sundays or holidays but did not work for a full four hours. *Id.* ¶¶ 16, 19. Furthermore, the defendants failed to pay eight hours of wages to their employees who worked more than four hours but less than eight hours through no fault of their own. *Id.* § 17. Finally, the indictment alleges that the defendants did not pay their employees for show-up time.[1] *Id.* ¶ 14. All of these alleged actions which were taken as part of this scheme to "unlawfully retain money and property

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[1] Show-up time refers to the situation where a union member is scheduled to work, shows up at the job site, but is sent home because no work is available for the employee to do.

from . . . union member employees" were in violation of the CBAs between PBI and its unions. *Id.* ¶¶ 10, 14-21. These practices resulted in the union employees receiving checks from the defendants that allegedly "contained less money than was due those employees under the terms of their union agreements." *Id.* ¶ 28.

The government also has alleged that the defendants devised and executed a scheme to reduce the amount they paid to the union pension and health and welfare funds on behalf of their unionized workers. The defendants supposedly accomplished this by submitting reports to the Laborers and Teamsters Unions which under-reported the number of hours worked by union employees. *Id.* ¶ 27. Based on these reduced hours, the defendants mailed checks to the Laborers and Teamsters Unions that contained less money than was due under the terms of their CBAs because contributions to the union pension and health and welfare funds are based on the number of hours worked by employees. *Id.* ¶ 29.

The individual acts of mailing doctored hours reports, certified payroll statements, union benefit contribution checks, and employee paychecks comprise the predicate acts of mail fraud alleged to support the RICO claim in Count I of the indictment. *Id.* ¶¶ 32-33 (Racketeering Acts 1a-1hh, 2a-2m). They also are breaches of the CBAs. The defendants' payroll and benefit obligations are determined by the provisions of the CBAs. *See Underwood v. Venango River Corp.*, 995 F.2d 677, 685 (7th Cir. 1993), *overruled on other grounds by Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994) (finding that severance pay

and seniority rights originate in CBA)[2]; *Chicago District Council of Carpenters Pension Fund v. Ceiling Wall Sys., Inc.*, 915 F. Supp. 939, 944 (N.D. Ill. 1996) (finding that right to proper amount of fringe benefit contributions is based in CBA). By allegedly failing to make the proper payments to their employees and unions, the defendants breached the CBAs. The question now becomes whether this breach, consistent with the LMRA statutory scheme, also may serve as the basis for predicate acts of mail fraud under RICO. For the answer to that question, I must determine if Congress intended for the LMRA to preempt RICO claims.

Preemption of Rico

The LMRA ensures that a uniform body of federal labor law will govern the enforcement of CBAs. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 451 (1957). RICO's purpose, on the other hand, is to eradicate the infiltration of legitimate businesses by organized crime. S. Rep. No. 91-617, at 76 (1969). Congress, however, did not intend to

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[2] The Supreme Court's decision in *Hawaiian Airlines* overruled *Underwood* only on the narrow ground concerning the scope of preemption under the Railway Labor Act, 45 U.S.C. § 151, *et seq.* ("RLA"). The Seventh Circuit held that RLA preemption was broader in scope than LMRA preemption, *Underwood*, 995 F.2d at 682. The Supreme Court disagreed and held that the scope of preemption under both statutes was "virtually identical." *Hawaiian Airlines*, 512 U.S. at 261, 263. Given this holding and the fact that the Seventh Circuit's preemption analysis in *Underwood* was based largely on LMRA cases, the precedential effect of the court's decision preempting the RICO claims is not diminished. *See Ceiling Wall*, 915 F. Supp. at 944 n.1.

limit RICO's scope solely to activities of or people involved with organized crime. Section 1962(c), the portion of the RICO statute under which the defendants have been indicted, applies to "any person" and "any enterprise." *See United States v. Turkette*, 452 U.S. 576, 590-91 (1981); *United States v. Aleman*, 609 F.2d 298, 303-304 (7th Cir. 1979). Given the differing nature and purposes of these two statutes, the LMRA's preemptive effect on RICO claims is not immediately evident.

Congress has not expressly stated its intent to remove RICO claims involving CBA breaches from the preemptive effect of the LMRA. In fact, when Congress designated what statutory violations could constitute predicate acts under RICO, it designated only one section of the labor laws, Section 186 of Title 29, as a predicate act. *Brown v. Keystone Consol. Indus.*, 680 F. Supp. 1212, 1225 (N.D. Ill. 1988) (citing *Butchers Union, Local No. 498 v. SDC Inv., Inc.*, 631 F. Supp. 1001, 1007 (E.D. Cal. 1986)). This specific reference to Section 186 as a RICO predicate act has led courts to conclude that "Congress was being selective as to what activities were being removed from the ambit of the exclusive jurisdiction of the labor law. The violation of no other labor statute constitutes a RICO predicate act." *Butchers Union*, 631 F. Supp. at 1009, *cited with approval in Brown*, 680 F. Supp. at 1225. This case does not involve any violations of Section 186.

In the absence of any express Congressional intent, the Seventh Circuit has provided "a two step analysis for determining when Congress intended to preempt a

claim" under Section 301.[3] *Underwood*, 995 F.2d at 684. The court explained the test as follows:

> The first step asks whether the claim seeks to vindicate a substantive right derived from some source other than the collective-bargaining agreement. Examples include FELA claims, FLSA claims, § 1983 claims, and state tort claims. If a claim survives the first inquiry, the second step asks whether adjudication of the claim requires interpretation of the CBA. When such interpretation is required, it impermissibly interferes with the federal scheme for labor dispute resolution.

Id. The first part of the test is satisfied if the predicate acts for the RICO claim are wrongful by virtue of something other than the obligations in the CBA. *See id.* (quoting *Hubbard v. United Airlines, Inc.*, 927 F.2d 1094, 1099 (9th Cir, 1991, *overruled on other grounds by Hawaiian Airlines*, 512 U.S. at 246).[4] A plaintiff, however, cannot avoid

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[3] *Underwood* actually addressed preemption under the RLA. Nevertheless, its reasoning is equally applicable in the present case. *See Ceiling Wall*, 915 F. Supp. at 944. First, the *Underwood* court relied extensively on LMRA preemption cases for part of its analysis. 995 F.2d at 680-81. Second, the Supreme Court has held that the preemption standard for RLA cases "is virtually identical to the pre-emption standard the Court employs in cases involving § 301 of the LMRA." *Hawaiian Airlines*, 512 U.S. at 260.

[4] *Hubbard* was overruled on the same narrow grounds as *Underwood* concerning the scope of RLA preemption. *Hawaiian Airlines*, 512 U.S. at 263 n.9. For the same reasons, its primary holding regarding LMRA preemption of RICO claims is unaffected.

LMRA preemption by " 'artfully pleading' " ordinary claims for breach of a CBA as RICO claims. *Id.*

In the present case, the government has alleged violations of the mail fraud statute, and these violations serve as the predicate acts for the RICO claim. 18 U.S.C. § 1961(1). The mail fraud statute, however, is a generic fraud statute because it does not define what is a fraud. *Butchers Union*, 631 F. Supp. at 1011. Congress left "the matter of what conduct may constitute such a [fraudulent] scheme for determination under other laws." *Parr v. United States*, 363 U.S. 370, 389 (1960). Therefore, I will look to other laws to determine "the underlying fraud which makes the use of the mails . . . actionable." *Brown*, 680 F. Supp. at 1226.

In this case, the defendants' alleged mail fraud is unlawful only by virtue of the obligations in the CBAs. *See Underwood*, 995 F.2d at 685; *Hubbard*, 927 F.2d at 1099 (9th Cir, 1991). Only the CBAs guarantee the defendants' unionized employees the right to a double-time wage, show-up pay, or any other wage and benefit provisions that are part of their CBA. *See Trans World Airlines, Inc. v. Sinicropi*, 887 F. Supp. 595, 606 (S.D.N.Y. 1995), *aff'd* 84 F.3d 116 (2nd Cir. 1996).[5] Thus, the RICO claim "does not

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[5] The court in *Sinicropi* provided a useful illustration of the difference between rights which depend solely on a CBA for their existence and those that trace their source to a law independent of the agreement. The court explained:

> A collective bargaining agreement might provide that certain employees working in "managerial" positions are entitled to $18/hour. The right to be paid that wage does not exist in any source of law, and came

seek to vindicate an independent substantive right derived from a source other than the collective bargaining agreement." *Ceiling Wall*, 915 F. Supp. at 944 (citing *Underwood*, 995 F.2d at 684-86). Any remedy for these alleged violations must be pursued under federal labor law which "was intended to provide the exclusive remedy for generic fraud claims relating to rights under a CBA." *Hubbard*, 927 F.2d at 1098. Because the government's RICO claim does not satisfy the first step in the preemption analysis, I need not reach the second inquiry except to note that the RICO claim would falter at this stage as well because it would require an interpretation of the CBA. *Underwood*, 995 F.2d at 685.[6]

> into existence solely through the terms of the collective bargaining agreement. The employee would have no right to it if the collective bargaining agreement did not exist. . . . Conversely, if that same collective bargaining agreement provided that "non-managerial" employees would earn a wage of $2/hour, an employee disgruntled with an interpretation of the collective bargaining agreement placing him in this category . . . would not be pre-empted from bringing an action under the Federal law establishing a minimum hourly wage. This is because the employee's right to a wage above that provided for by the collective bargaining agreement exists independently of whatever obligations may be specified in the agreement.

Sinicropi, 887 F. Supp at 606, *quoted in Goulart v. United Airlines, Inc.*, No. 94 C 6237, 1996 WL 111895, at *4 (N.D. Ill. Mar. 12, 1996).

[6] Although most courts that have addressed this issue have found the RICO claims to be preempted, one court has reached the opposite conclusion. In *Boffa*, the Third Circuit held that a scheme by an employer to defraud unionized employees of

Thus, the government's RICO claim in Count 1 is preempted by the LMRA to the extent that it is based on predicate acts of mail fraud in connection with a scheme to defraud the defendants' employees and unions.[7] Counts 8-30, alleging mail fraud based on the same labor fraud scheme, also are preempted.

ERISA Claims Preemption

Counts 35-42 of the indictment charge the defendants with making false statements in connection with required ERISA filings. 18 U.S.C. § 1027. The defendants argue that these charges, like the RICO and mail fraud charges, also are preempted by the LMRA. Based on the analysis above, I already have determined that the defendants' alleged actions concerning their contributions to the unions' pension and health and welfare benefit funds would constitute breaches of the CBAs. Thus, the issue is whether the LMRA has the same preemptive effect on Section 1027 as it does on RICO.

To establish a violation of Section 1027, the government must prove that "(1) the defendant made a false statement; (2) knowing it to be false; and (3) in a document required by ERISA" *United States v. Coyle*, 63 F.2d

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wages and seniority rights as guaranteed in a CBA "lies squarely within the ambit of the mail fraud statute, and accordingly, it refused to preempt a RICO claim based on this mail fraud. *Id.* at 930. *Boffa* is distinguishable from the instant case because its preemption analysis involved the NLRA. It did not address preemption under the LMRA.

[7] These allegations are contained in Paragraphs 12-33 of the indictment.

1239, 1245 (3rd Cir. 1995). Therefore, in the instant case, the government will have to prove that the statements made by the defendants in their ERISA filings with the unions were false. The truth or falsity of the defendants' statements, however, cannot be determined without reference to the underlying CBAs which created the ERISA obligations. The formula for determining the amount of the defendants' contributions and the exact amount of those contributions are controlled by the CBA. The defendants would not have made any contributions, prepared any reports, and made any filings without the requirements in the CBAs to do so. Therefore, these requirements owe their "existence solely to the terms of the collective bargaining agreement[s]. . . . " *Sinicropi*, 887 F. Supp. at 606. Consequently, Counts 35-42 also must be dismissed on the basis of preemption

Conclusion

Because of the preemptive effect of the LMRA, portions of the government's indictment cannot stand. Accordingly, the Laborers' and Teamsters' section of Count 1, Counts 8-30, and Counts 35-42 are dismissed.

ENTER ORDER:

/s/ Elaine E. Bucklo
Elaine E. Bucklo
United States District Judge

Dated: August 15, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.
	)	96 CR 613
PALUMBO BROS., INC.,	)	
MONARCH ASPHALT CO.,	)	
PETER PALUMBO, JOSEPH	)	
PALUMBO, SEBASTIAN	)	
PALUMBO, KELSON ABDISHI,	)	
DANIEL FERRARINI, and	)	
GERALD McGREEVEY,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

I have considered the Government's motion for reconsideration. My conclusion is that some points made in the court's prior opinion may benefit from further explanation or revision. However, I continue to believe that existing law in this Circuit compels the conclusion I reached earlier. The motion is therefore denied.

The Government's indictment charges defendants with a course of conduct involving, among other things, violation of the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343.[1] The mail fraud statute

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[1] Although there is language in some district court opinions noting that the specification in the RICO statute of section 186, Title 29, as a "racketeering activity" might be construed as an intention by Congress to exclude any other

proscribes "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1341. The alleged fraud charged in this case is the deprivation of wages and pension benefits due employees and union pension funds. The second superseding indictment charges defendants with underreporting hours worked by union employees and failing "to comply with other wage and benefit provisions of their union agreements" and failing to "pay . . . employees specific hourly wages according to their job classifications, in violation of the" collective bargaining agreements in effect. Second Superseding Indictment, ¶¶ 12, 13. Numerous other acts also alleged to violate the federal mail and wire fraud statutes also refer to violations of collective bargaining agreements over a lengthy period of time.

In their motion to dismiss these counts of the indictment, defendants argued that (1) to determine whether they were guilty of violations of these agreements, the court and jury would have to interpret the applicable collective bargaining agreements; (2) the indictment alleged a unilateral change in the contract; and (3) these allegations thus were either subject to the exclusive jurisdiction of the NLRB or were at least preempted by section 301 of the LMRA. In its response the Government addressed only generally the question whether the collective bargaining agreements would have to be interpreted.

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activity covered by the labor laws from RICO coverage, I do not believe such an intention can be ascertained from the legislative history.

Based on the allegations of the indictment, it seems likely that the terms of the collective bargaining agreements will be in issue.

The Government relies on the Third Circuit's opinion in *U.S. v. Boffa*, 688 F.2d 919 (3d Cir. 1982), in which, while overturning certain convictions on the ground that the indictment improperly entrenched on NLRB jurisdiction, the court upheld portions of the convictions that the Government says are comparable to the charges in the present case. The distinction made by the *Boffa* court was between conduct that was under the exclusive jurisdiction of the NLRB, involving the right to engage in collective bargaining or other unfair labor practices, which the Court found Congress had specifically exempted from the operation of criminal law, and other conduct that involve violations of the federal labor laws. The court held that a defendant could be convicted of mail fraud for conduct that while arguably also an unfair labor practice, involved the deprivation of economic benefits contained in a collective bargaining agreement.

U.S. v. Boffa was a Third Circuit case. The question before me is whether the Seventh Circuit would agree that the conduct alleged in the present indictment could support a conviction under RICO. In my earlier opinion I concluded that the existing precedent indicated that this circuit has declined to follow *Boffa*. The principal case discussed in my opinion was *Underwood v. Venango River Corp.*, 995 F.2d 677 (7th Cir. 1993). In that case, the Seventh Circuit affirmed the dismissal of a RICO complaint on the ground that the Railway Labor Act (RLA) preempted plaintiffs' claims. In so doing, the court relied on cases finding preemption of RICO claims by the NLRA

and LMRA. The Government argues that *Underwood* is quite different from the present case because the alleged labor disputes were resolvable only under the dispute resolution process of the RLA, which included an internal dispute-resolution process and an adjustment board established by the employer and unions. *See Hawaiian Airlines, Inc. v. Norris*, 114 S. Ct. 2239, 2244 (1994). But the Supreme Court has noted that collective bargaining agreements invariably require resort to arbitration proceedings before a section 301 claim may be brought to court. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 219 (1985). *See Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 411 n. 11 (1988). Thus, even if I were free to disregard the *Underwood* court's reliance on cases under the NLRA and LMRA, the fact that it involved an RLA claim would not seem to make a material difference.

One of the cases noted with apparent approval in *Underwood* was *Brown v. Keystone Consolidated Industries, Inc.*, 680 F. Supp. 1212 (N.D. Ill. 1988). In *Brown*, the court dismissed a claim brought under RICO, finding preemption under both the LMRA and NLRA because the underlying conduct was wrongful solely by virtue of the labor laws. *Id.* at 1226. In a subsequent case, *Talbot v. Robert Matthews Distributing Co.*, 961 F.2d 654 (7th Cir. 1992), the Seventh Circuit agreed that a RICO claim should be dismissed on the ground that the conduct alleged to violate RICO was preempted by the NLRA. The court distinguished *Boffa* on the basis that in *Talbot*, unlike *Boffa*, the conduct was "wrongful only by virtue of the labor laws."

I can find no distinguishing characteristic between these cases and the present case. The conduct alleged here is unlawful because the breaches of the collective

bargaining agreements alleged violate the LMRA, and possibly the NLRA. Numerous other courts have held that similar conduct cannot be the predicate for a suit under RICO. *E.g., Hubbard v. United Airlines, Inc.*, 927 F.2d 1094 (9th Cir. 1991); *Chicago District Council of Carpenters Pension Fund v. Ceiling Wall Systems, Inc.*, 915 F. Supp. 939 (N.D. Ill. 1996); *Franks v. The O'Connor Corp.*, 141 L.R.R.M. 2559 (E.D. Pa. 1992); *Chicago District Council of Carpenters Pension Fund v. Juell*, 1987 WL 13667 (N.D. Ill. 1987).

The Government notes that all of these cases are civil. But RICO does not distinguish between plaintiffs in defining what constitutes a violation of 18 U.S.C. section 1962. Compare 18 U.S.C. §§ 1963 and 1964. 1 am bound by the law of this circuit. Since my interpretation of that law is that a claim under RICO cannot be predicated on actions that are based on interpretations of contracts arising under federal labor laws, the Government's motion for reconsideration is denied.

ENTER ORDER:

/s/ Elaine E. Bucklo
Elaine E. Bucklo
United States District Judge

Dated: October 9, 1997

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 12, 1998

BEFORE
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. ILANA DIAMOND ROVNER, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellant, Nos. 97-3807 v. PALUMBO BROTHERS, INC., et al., Defendants-Appellees.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 96 CR 613 Elaine E. Bucklo, **Judge**

ORDER

On consideration of the petitions for rehearing with suggestion for rehearing en banc filed in the above-captioned case by defendants-appellees Daniel Ferrarini, Palumbo Brothers, Inc., Peter Palumbo, Joseph Palumbo and Sebastian Palumbo, all of the judges on the original panel voted to deny and none of the judges in active service has requested a vote thereon.*

Therefore, the petitions for rehearing with suggestion for rehearing en banc are DENIED.

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* Neither The Honorable Joel M. Flaum nor The Honorable Kenneth F. Ripple took part in the consideration of the suggestions for rehearing en banc.

29 U.S.C. § 151. Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest,

by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

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29 U.S.C. § 152. Definitions

When used in this subchapter –

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations corporations, legal representatives, trustees, trustees in cases under Title 11, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C.A. § 151 et

seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 158 of this title.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of

persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 153 of this title.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means –

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.[1]

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29 U.S.C. § 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board

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[1] So in original. Probably should be "persons".

pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the

employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents –

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his

employees subject to the provisions of section 159(a) of this title;

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is –

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the

representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to

pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed,

graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification –

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159 and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such

employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) Enforceability of contract or agreement to boycott any other employer; exception

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent

unenforcible[1] and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any

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[1] So in original. Probably should be "unenforceable".

action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(g) Notification of intention to strike or picket at any health care institution

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the

notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

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29 U.S.C. § 159. Representatives and elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

(b) Determination of bargaining unit by Board

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employees as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) Hearings on questions affecting commerce; rules and regulations

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board –

> **(A)** by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or
>
> **(B)** by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

(d) Petition for enforcement or review; transcript

Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) Secret ballot; limitation of elections

(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

29 U.S.C. § 160. Prevention of unfair labor practices

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less

than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

(c) Reduction of testimony to writing; findings and orders of Board

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board

upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of

any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Modification of findings or orders prior to filing record in court

Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and

for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for

the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of

the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) Institution of court proceedings as stay of Board's order

The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) Jurisdiction of courts unaffected by limitations prescribed in chapter 6 of this title

When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by chapter 6 of this title.

(i) Repealed. Pub.L. 98-620, Title IV, § 402(31), Nov. 8, 1984, 98 Stat. 3360

(j) Injunctions

The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor

practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Hearings on jurisdictional strikes

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) Boycotts and strikes to force recognition of uncertified labor organizations; injunctions; notice; service of process

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title,

the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: Provided further, That such officer or regional attorney shall not apply for any restraining order under section 158(b)(7) of this title if a charge against the employer under section 158(a)(2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party,

shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b)(4)(D) of this title.

(m) Priority of cases

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 158 of this title, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (1) of this section.

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29 U.S.C. § 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in

which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

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18 U.S.C. § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything

represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

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18 U.S.C. § 1961. Definitions

As used in this chapter –

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title

18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or

extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157

of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, or (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of

Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

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18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

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18 U.S.C. § 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law –

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any –

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes –

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (1) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section –

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that –

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being

destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase

forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to –

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public

sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to –

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall

apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (1), no party claiming an interest in property subject to forfeiture under this section may –

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition

and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(l)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held

within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine *witnesses who* appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that –

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant –

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

18 U.S.C. § 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in

which case the statute of limitation shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.